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No. 814

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

C. H. SOUTHER, ET AL.,
Appellants,

vs.

SAN DIEGO FLUME CO.,
Appellee.

BRIEF OF APPELLEE

WORKS, LEE & WORKS,
Counsel for Appellee.

Clerk

Filed Mar 1902

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Court of Appeals
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IN THE

CIRCUIT COURT OF APPEALS OF THE UNITED STATES

NINTH CIRCUIT

C. H. SOUTHER, ET AL.,
Appellants,

vs.

SAN DIEGO FLUME CO.,
Appellee.

STATEMENT OF THE CASE.

This action was brought by the appellants originally to set aside and cancel a contract between them and the appellee, by which they purchased from the appellee a water right to fifteen inches of water, to be supplied from the system of the Company, and to recover damages in the alleged sum of $6500.00 for the failure of the Company to furnish them the amount of water agreed by the contract to be furnished. The appellee filed its answer, and also a cross complaint, setting up the same water right contract, asking for a decree in its favor for the amount agreed to be paid by the appellants, and to foreclose that contract against the real estate described therein which was to be supplied by the water furnished. The Circuit Court held that the water right contract was void, on the ground that the Company had no power to make such a

contract, and further, that the contract being void, no action could be maintained by the complainants in the action to rescind or cancel the contract, and both the bill and the cross bill were dismissed. The complainants in that action, the appellants here, bided that decision, and took no appeal. The defendant in the action, the appellee here, appealed from the decree rendered, and the same was reversed.

San Diego Flume Co. v. Souther, 90 Fed. Rep. 164.

On the appeal in this Court, the position was taken and argued by counsel that sufficient ground was shown for a rescission of the contract, and that the facts were competent to be urged against the appeal under the answer to the cross complaint, although no appeal had been taken by them from the decree dismissing their original bill. This Court, acting upon that claim of theirs, held upon the merits that there was no ground for a rescission of the contract.

This would seem to settle the question now urged on this appeal, that the appellants were not entitled, on the re-trial of the case, to a rescission of the contract. Upon the case coming down, it was fully re-argued in the Circuit Court, both orally and upon printed briefs, and a decree rendered by the Court in favor of the appellees for the amount agreed to be paid by the water right contract. This appeal is taken from that decree, and errors without number, almost, are assigned. But we submit that as to almost all of the questions attempted to be raised by the assignment of errors, the appellants are foreclosed by the former decision of this case by this Court, and by the fact that no appeal was taken by them from the decree of the Court dismissing their bill to rescind and cancel the contract. Certainly they can not, under their answer, and the decree having been rendered against them on their bill, have a cancellation of the contract sued upon by

the appellees. There was a decree rendered against them on that question, and no appeal having been taken, the decree became final. Under their answer, they could do no more than defend against the allegations of the bill and could not have affirmative relief. This, we submit, left open to them nothing but the simple question of the amount of damages, if any, to which they were entitled under their answer. But as they contend to the contrary, it may be necessary for us to burden the Court with another argument of the same questions that were argued and submitted upon the former trial as to their right to a rescission of the contract, assuming that they were in condition, under the pleadings, to insist upon any such remedy.

ARGUMENT.

We submit, at the outset, that the appellants have no standing in this Court, and had none in the Court below, to call for relief by way of a rescission of the contract sued upon in the cross bill. They had brought their suit to rescind the contract, alleging the grounds therefor in their bill. The Court below, on the first hearing of the case, dismissed the bill, and no appeal was taken by them from that decree. That decree must, therefore, stand as conclusive against them. But on the first appeal to this Court, they argued that question upon its merits, and insisted that they were entitled to a rescission of the contract, and this Court decided it upon its merits, and with respect thereto said:

"This suit was brought to cancel a written instrument. In order to authorize the court to grant the relief prayed for, facts must be alleged which show the necessity for the equitable interference of the court. In this case it is not alleged that the contract was procured by fraud or duress, or that it was entered into by the mistake of either party. No facts are shown in the bill or in the evidence from which it may be inferred that the written contract is a menace to the complain-

ants, or that there is danger that it may be used tortiously or oppressively by the defendant to their injury. In 2 Pom. Eq. Jur., Sec. 914, the principle governing this class of cases is thus stated:

'The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete.

In Insurance Co. v. Reals, 79 N. Y. 202, it was said of the powers of a court of equity:

'Such a court will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is able to avert.'

Of similar import are the decisions in Ryerson v. Willis, 81 N. Y. 277; Johnson v. Murphy, 60 Ala. 288; Insurance Co. v. Bailey, 13 Wall. 616; Kimball v. West, 15 Wall, 377; Atlantic Delaine Co. v. James, 94 U. S. 207; Blake v. Coal Co., 22 C. C. A. 430, 76 Fed. 624.

Viewed in the light of the authorities, there was clearly no error in dismissing the complainants' bill."

But aassuming that that question is still open for determination on this appeal, we again submit that no ground whatever for the rescission of the contract was shown.

It is important, therefore, that we should look to the issues formed by the cross bill and answer thereto, for that is what is now presented for determination. This is particularly necessary because the learned counsel for the complainant seem to to have argued pretty much everything except the real and only questions presented. They have argued the case upon the theory that, under the issues, the contract in question here must be treated as the only one ever made by the defendant, except the one previously made with the complainants, for a like quantity of water, and that the defendants failed and refused to supply *any* water to the complainants, thus, showing

a total failure of consideration for their promise to pay for the water right. And following this statement of the questions involved, and their arguments founded thereon, they proceeded to maintain, as best they can, that, therefore, they had the legal and equitable right to treat the contract as rescinded, pay nothing, and recover large damages besides. Let us see, at the outset, whether the premises from which they draw their conclusion actually exist.

And, first, can the case be treated as though the defendant had made these two contracts, only, and is in no manner bound to supply other consumers under its system or protect them, in common with the complainants, from loss, in case of shortage of water, by conserving and distributing the water to the best interests of all consumers concerned? If this be so, it must be shown by the allegations of the pleadings and the evidence, and the proper application of the law to the facts alleged and proved.

The cross bill alleges that the defendant was organized and empowered to appropriate, furnish and supply water to others for irrigation and domestic use in the County of San Diego; that it owns a flume and aqueduct by which it conveys, and heretofore conveyed, the waters it impounds, stores and diverts, to and upon the El Cajon Rancho for distribution among consumers of water for domestic and irrigating uses; that on the 12th day of March, 1890, it entered into a contract with the complainants by which it sold and conveyed to them a water right for fifteen inches of water, perpetual flow, for nine thousand dollars. The contract is set out in the cross bill in full, and amongst other things, in addition to the conveyance of the water right, contains these covenants and conditions:

"The party of the first part covenants and agrees for itself,

its successors and assigns, to furnish, subject to restrictions and conditions herein contained, a continuous flow of water, equivalent to 12,960 standard gallons in every twenty-four hours for each inch of said fifteen inches of water, Miner's measure, under a four-inch pressure, hereby conveyed, subject always, however, to such reasonable general rules and regulations as the said corporation may from time to time adopt.

Provided, however, that if said corporation's supply of water be at any time shortened, or its capacity for delivering the same impaired, by the act of God or by the elements, or by drought or the failure of the average amount of rainfall in the mountains, or by operation of law, riot, insurrection, or public enemies, or by accident or wilful injury to any part of its system of water works, the above described land and the lands to which said ten inches of water, or any portion thereof, may be attached, as hereinbefore provided, shall, during the period of such shortage or impairment, be entitled to only such water as can be supplied to and for it after the full supply shall have been furnished to all cities and towns that are or may be dependent either in whole or in part upon said system of waterworks for their supply of water for municipal purposes and for the use of their inhabitants.

And the said party of the first part shall not be responsible for any deficiency of water occasioned by any of the above causes, but the party of the first part shall use and employ all due negligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein."

Record p. 33.

It is further alleged that, pursuant to law, the board of supervisors, on the 9th day of January, 1891, on the petition of the requisite number of citizens of the County, fixed and established the annual rates to be charged by the defendants for water supplied to its consumers. It is further alleged:

"That during the winter of 1893-94 and the summer of 1894 a severe and prolonged drought prevailed throughout the said County of San Diego, and covering the entire watershed of your orator, and there was a failure of the average amount of rainfall in the mountains from which your orator obtained its water supply; and by reason of said drought and

failure of the average amount of rainfall, and for no other reason, your orator was, without fault or neglect on its part, unable to supply to the consumers of its water, and to whom it had become liable to furnish water, the full supply to which they were entitled, and by reason thereof, and for no other or different cause, your orator duly notified all consumers, including the defendants, that in order that all might suffer as little as possible from the scarcity of water, the supply to be furnished to all consumers during the continuance of said drought would be reduced one-half; and, in pursuance thereof, the gates connecting the flumes and pipes of your orator with the pipes and flumes of consumers, including the defendants herein, were so set and maintained as to furnish during said time, only such one-half of the full supply of water; but that immediately upon said drought being broken, and as soon as your orator was able to do so, it gave notice to all said consumers, including the defendants, that it was ready to and would again furnish the full supply of water."

Record, p. 35, par. 10.

The notice served is set out in full. It is further alleged that from that time on the defendant was ready, able and willing to furnish a full supply of water to the complainants, and all other of its consumers, but that the complainants refused and ever since have refused to receive it, and so notified the defendants, and followed it by a notice of rescission of the contract. Following this is this allegation:

"But your orator shows to your Honorable Court, and alleges the facts to be, that there has not been an entire failure of the consideration for the obligation of said defendants to pay the sums of money agreed by said contract to be paid, or even a partial failure of said consideration, and that there has not been, at any time, an entire or total or partial failure or inability of your orator to furnish and supply, in accordance with said contract, the said fifteen inches of water since on or about the 7th day of June, 1894, as asserted in said last-named communication, but that it has, at all times, furnished to the said defendants the supply of water provided for in said contract, and in strict compliance therewith, and that it has not failed except during the drought aforesaid,

and in the manner, during the time and for the reason above set forth, to furnish the full supply of said water, and that its failure to furnish said full supply during said time is authorized by said contract."

Record, p. 41.

Then follows the general allegation of full performance by the defendants and failure to perform by the complainants, and the amount due under the contract.

See Cross Bill, Record, p. 41, par's. 12, 13.

If we apply the denials and allegations of the answer of the complainants to the issues presented by the cross-bill, there can be no difficulty in arriving at the real questions presented.

By the answer it is admitted that the defendant is organized for the purpose of engaging, and is actually engaged, in supplying water to the public, and it is expressly averred that its only rights in the water it has appropriated "were acquired by it as an appropriator under the constitution and the statutes of the State of California, and the Acts of Congress of the United States."

Record, p. 62.

So this contract can not be treated as an ordinary contract between private individuals and irrespective of the duties and obligations of the defendant to *all* of its consumers.

We need not take up time with the admissions and denials relating to the fixing of rates by the board of supervisors.

The answer admits as follows:

"10th. They admit that during the summer of 1894 a drought prevailed throughout the said county of San Diego, covering the entire watershed of cross-complainant, and that there was a failure of the average amount of rainfall in the mountains, from which cross-complainant obtains its water supply."

Record, p. 65.

This is followed by a denial that because of the drought, or failure of the average rainfall, "and for no other reason," the cross complainant was "without fault or neglect on its part," unable to supply the full quantity of water to its consumers, or that, for that "and for no other reason" it notified its consumers that the quantity of water supplied during the drought would be reduced to one-half.

It is admitted that the complainants were so notified and that the gates through which they were supplied with water were so set and adjusted as to furnish them a half supply. They deny, for want of knowledge on the subject, that other consumers were similarly treated.

They likewise deny that on the 8th day of December, 1894, the defendant gave notice to *all* its consumers of its readiness and ability to again furnish a full supply of water, but admit that such a notice was given the complainants.

They deny, on information and belief, that from the 10th day of December 1894, the cross complainant was again ready to supply the complainants with the maximum quantity of water to which they were entitled, but admit that it offered, then, to furnish them their full supply of water, but they refused to receive it, and in response to such notice, two days later, gave notice of their refusal, and allege that on the 2nd day of October, 1894, they gave notice of the recission of the contract and that since that date they have refused to accept the water, and have treated the contract as at an end. They deny, in general terms, that the cross complainant has "at all times," furnished complainants a full supply of water except during the time of drought, or that its failure to supply the water was justified by the terms of the contract. Their specific denial is as follows:

"12th. They deny that cross-complainant has fully, or

otherwise, in all things, or in any of them, complied with and performed all or any of the terms or covenants or conditions of said contract of March 12th, 1890, on its part to be done, or performed, *except that it furnished 15 inches of water thereunder up to June* 7th, 1894."

Record, p. 68.

They further allege that the defendant's system did not have a capacity of more than 375 inches and that it had contracted to furnish over 600 inches, and to supply the Indian Reservation, and between January 1, 1894, and sometime in July, it had wrongfully furnished not less than 1,500,000 gallons of water to the San Diego Water Company, because it could get a higher price therefor than was being paid by other consumers, or from the complainants under their contract, and further:

"And defendants further aver, on information and belief, that by reason of the said cross-complainant having, prior to October 2nd, 1894, sold and tried to furnish more water, for compensation, than it had the capacity to supply, and for no other reason, the cross-complainant was unable to, and failed to furnish the defendants, *from June* 7th 1894, until October *2nd*, 1894, with their 15 inches of water, under said contract of March 12th, 1890."

Record, p. 70.

They admit their failure to pay the principal sum privided by the contract to be paid for the water right, and interest thereon from the 1st day of May, 1894, together with the annual rental for the water used from the 1st day of December, 1894, but deny that the said items or any of them are due and allege that " they were not paid for the reason that said contract was ignored and abrogated by the cross-complainant *on and after the 7th day of June*, 1894."

Record, p. 71.

This is followed by allegations showing the damage result-

ing to the complainants, by reason of the facts alleged, but adding nothing to the averments above referred to, affecting the questions to be determined, and alleging their damages to be $6,500.00.

The answer contains no prayer for the rescission of the contract or for damages.

See Answer to Cross Complaint, Record, pp. 61-77.

To this answer the usual replication was filed.

These are the issues upon which the case is now here. The pleadings show that the defendant company was a corporation supplying water to the public, including the complainants; that the complainants purchased the water right on the 12th day of March, 1900; that they had received their full supply of water from that time until the 7th day of June, 1894, when their supply, in common with all other consumers, was, on account of the severe drought of that year, reduced to one-half, and that quantity, only, furnished until December 10th, 1894, when the defendant company announced its readiness and ability to supply the full quantity of water but the complainants refused to receive it and gave notice of rescission of the contract; and that complainants had paid no part of the principal sum agreed to be paid for the water right and no interest since May 1st, 1894.

So it is undisputed that before any breach of the contract by the company, conceding there was a breach, the complainants had enjoyed the full benefit of the water right contract from March 12th, 1890, to June 7th, 1894, a period of *four years and three months*, lacking five days, for which they have paid nothing. Then from June 7th to December 10th, a period of *six months*, and three days, the company furnished only one-half of the full supply of water to which the complainants

were entitled, if the effects of the drought furnished the company no excuse for the failure to supply the full amount.

And in addition to this the full amount of damages alleged to have resulted to the complainants from the alleged breach of the contract was only $6,500, or $2.500 less than the principal sum due for the water right saying nothing about the accrued interest. Not only so but *after* the alleged breach, from and until the end of that irrigation season, when other consumers were needing the water, the complainants continued to accept and use the one-half of the water under the contract, the same as the other consumers were receiving water, and now repudiate all liability to pay for it.

It is upon this state of facts that counsel for complainants appeal to this, a court of equity, to rescind the contract and relieve them from all liability to the company.

But we have, so far, only called attention to what is alleged in the pleadings. It is equally as important, in view of the position taken by counsel, to notice what is omitted from the pleadings. They maintain that, under the law of this state, the doctrine " first in time, first in right" must prevail, as between takers of water from a company like this. This we will discuss farther along. But, to enable them to invoke this doctrine they must, necessarily, allege the facts showing their priority in time. This has not been done. Admitting everything that has been alleged in their answer it may be true that theirs was the last contract of any for water to be furnished by the company. They made this contract. They are alleging its breach. Therefore they must allege and prove such facts as will establish their legal right to the full amount of water where there was an admitted shortage resulting from the drought from which some of the consumers must suffer. They

for some reason were careful to prove other contracts prior in time to theirs.

Record p. 244.

Again they allege the conclusion that water was furnished to the San Diego Water Company, in violation of their right to it, but there is nothing to show that their right to the water was in any way superior to that company. Indeed, so far as their answer shows, the San Diego Water Company might have been entitled to all of the water, in preference to them, particularly if their doctrine of priority of right, according to time, is to prevail.

So much for the pleadings. It is proper that in making this statement we should also refer briefly to the evidence. It must be remembered, however, that this evidence was taken on the issues as they were formed by the bill of complaint and answer as well as the cross bill and answer thereto. Then, an issue of rescission of the contract was presented. Now, it is not. The only question that is presented is one of damages for an alleged breach of the contract. But the evidence clearly shows that the defendant was engaged in supplying water to numerous takers from its system, for irrigation and domestic use. That for a part of the year its water was supplied by flowing streams, but for the latter part of the summer season it was dependent, for its supply, upon water stored in its reservoirs, the main one of which was in the mountains, the water being carried and distributed by means of a main flume and pipe line extending from the reservoir to the City of San Diego. It is shown by a clear preponderance of the evidence that the capacity of the storage system and flume of the company, of an ordinary, or average year, was not less than 700 inches.

The evidence clearly shows that the failure to furnish the

full supply of water during the summer of 1894 was the result of the causes mentioned in the contract as excusing the defendant from liability therefor.

See testimony of Mr. Doolittle, Record, pp. 263, 265, 267, 268, 269.

In this testimony the reason for the failure to furnish the water is clearly stated. The fall of rain only amounted to 14.55 inches, and was less, by fifty per cent. than any previous recorded rainfall.

Record, p. 269.

And this was the only time, before or since, that the defendant has been unable to furnish the full supply of water to all its consumers.

Record, p. 271.

There is other evidence, showing clearly that it was the unprecedented drouth that prevented the defendant from complying with its contract, but this is an undeniable and an undisputed fact, and we need not trouble the court with further reference to the evidence on that point. And counsel do not claim to the contrary. They make two points only: a. That the defendant had, in the first place, sold and obligated itself to furnish more water than it had the capacity to supply, and b. It was not furnishing water to the City of San Diego but to the San Diego Water Company for the city. As to the first of these counsel clearly misstate the fact. The testimony to the effect that the defendant was unable to supply the water it had obligated itself to furnish, during an average year is purely theoretical, and expert, which means much the same thing in a case of this kind. But the positive and undisputed evidence is, that the defendant always *has* been able to furnish all the water demanded and has, in fact, furnished it, both before and since the summer of 1894, and was only prevented

from doing so that year by the extreme and unprecedented drouth.

Mr. Doolittle, secretary of the defendant, says in his testimony:

"Q. I understand you that notwithstanding the fact that you did cut down the supply of your consumers, and in that way decrease the draught from the reservoirs, that on account of the drouth that year the quantity of water was reduced below what it was at any other time during the history of the company?

"A. It was.

"Q. *Has there been any other time since the Flume Company commenced to supply water to its consumers, that it has been compelled to, or has, on account of scarcity of water, cut down the supply to consumers?*

A. *They never have reduced the supply, on that account at any other time.'*

Record, p. 271.

See also the testimony of Mr. Hearne, observer weather bureau, Record, pp. 410, 412.

And of Mr. Schuyler, pp. 420, 422, 429, 431.

There is no evidence to the contrary.

But, in addition to this the undisputed evidence shows that the total number of inches sold is only 537 1-20 inches, up to the date of taking evidence in this case, and that the number of inches *in actual use,* at that time, was only 326.71 inches and that there were even less sold and in use in 1894.

Record, pp. 271-277.

The water sold to the Junipero Land and Water Company is not included, as it is fair to presume that no one would demand water, at the price named in its contract, viz: 10 cents per thousand gallons.

Record, p. 275.

This is the evidence as to the quantity of water the defendant is obligated to furnish. The evidence that it is able to supply it,

aside from the positive proof that it has always done so, is equally convincing.

The quantity of water upon which the defendant has made its filings is shown.

Record, p. 324.

And the reservoirs already constructed are enumerated.

Record, pp. 326, 327.

And that it has the construction of other reservoirs in contemplation and partially provided for when the demand for water calls for them.

Record, pp. 327, 328, 341, 371.

And that the flume has been so constructed as to carry a much larger supply of water, when needed, by merely putting on additional side boards.

Record, pp. 329, 330, 331.

And that the flume as now constructed has been found sufficient to supply all water demanded except during the summer of 1894.

Record, p. 330.

And that the additions to the system now contemplated, and for which surveys have been made, will increase the capacity of the same to over 5,000 miner's inches perpetual flow.

Record, p. 334.

As we have seen, the quantity of water actually sold by the defendant, excluding the Junipero's contract was 537 inches, and the amount actually demanded is only 326.71. So the question is whether, at the time the complained of shortage occurred, the defendant was able, with the water and system it then had, to furnish the water actually demanded, of an average or ordinary year. That it was so able is clearly proved. Mr. Hyde, the engineer of the defendant gives the capacity of

the Cuyamaca reservoir, alone, as 490 miner's inches, perpetual flow.

Record, pp. 370, 371.

And the reservoir is only drawn from during the time from sometime in June to sometime in December.

The balance of the year the water was drawn from the natural flow of the streams.

Record, p. 310.

The engineer gives the carrying capacity of the flume of the company, as between 700 and 800 inches.

Record, p. 374.

And says that if placed exactly on grade it would carry 900 inches.

Record, pp. 374, 375.

Mr. Schuyler gives the carrying capacity of the flume, as it existed in 1894, as 900 inches, reduced to probably 750 inches by the flume having settled in places.

Record, p. 418.

And says, allowing for leakage and evaporation,, its actual duty was in excess of 700 inches.

Record, p. 418.

He also says that the Cuyamaca reservoir would supply 495 inches from June 1st to January 1st, which is a longer time than it is drawn from, as shown above, making proper allowances for evaporation and other losses.

Record, p. 419.

This is in case the reservoir is filled to the 31-foot contour line, which as shown by Mr. Doolittle's testimony is always the case where there is an average amount of rainfall.

Record, p. 252.

And every year except 1894, within three or four inches of it.

As against this we have the testimony of Mr. Harris, an expert, that the capacity of the flume is 620 inches, which is sufficient for our purpose. But he makes deductions from various causes which reduces the amount to 228 inches.

Record, pp. 182, 183.

Which is so grossly exaggerated as to render the testimony of the witness wholly worthless. It is a little singular that the testimony of this witness should ever have been taken when the complainants contend that the defendant has sold, and has actually been delivering, through this same flume, nearly 500 inches of water, and the evidence shows conclusively, that the flume, the capacity of which must be the same whether the season has been a wet or a dry one, has actually been delivering 326 inches right along, as we have shown above.

The witness shows himself to be both an interested witness and an utterly unreliable one.

Record, pp. 191, 195, 205.

He gives the capacity of the Cuyamaca reservoir, without deductions for evaporation and other causes, at 547 inches perpetual flow.

Record, p. 188.

Mr. Alverson, another of their expert witnesses, gives the actual practical capacity of the flume as about 550 inches.

Record, p. 221.

And the capacity of the Cuyamaca reservoir at 550 inches perpetual flow.

Record, p. 223.

And after all deductions for evaporation and other losses, which no one can reasonably deny are excessive, he makes the actual duty of the reservoir, for 180 days, 225 inches, per-

petual flow, and 450 inches during the time the reservoir is actually drawn from, and longer, of 450 miner's inches.

Record, pp. 229, 230.

So, according to their own witnesses, the actual ability of the system was largely in excess of the demands made on it, which as we have shown, amounted to only 326 inches. Not only so, but it shows its capacity to be sufficient, of an average year, to supply the total amount contracted for without any additions to the system. But the company is only bound, in making additions to its system, to keep pace with the actual demands of its consumers. To add to its system, unnecessarily, would only impose an additional and useless burden, both upon the company and its consumers. And the evidence shows that with its present expenditure the company is entitled to demand $120 an inch, annual rental, for its water. The board of supervisors have so adjudged, and that rate has been legally established.

See defendants' cross bill, p. 35, Record, p. 323.

And the acceptance of a less sum by the defendant is a pure matter of grace.

To construct this plan the company has been compelled to issue bonds in the sum of $663,000 and the stockholders have put in of their own money nearly $600,000 more.

Record, p. 332.

It has actually cost over a million and a half dollars.

Record, p. 331.

And all that the company has been able to realize, from this large expenditure, including money received from the City of San Diego, is $45,000 per annum, and nearly half of this comes from the city.

Record, pp. 331, 332.

It would be very poor policy as respects both the company

and the consumers, to add to this large expenditure until there is such a demand for water as to call for it. When the demand comes, the company has an ample supply of water. It is, as Mr. Harris, their witness, says, a mere matter of providing storage for the water.

Some stress was laid upon the fact that the defendant was obligated to furnish a large amount of water to the Indians on their reservation, and a contract, purporting to have been made with the government, to that effect, was introduced in evidence.

Record, p. 478.

But, while such a contract was formally executed, between the defendant and the Indian agent, it never was accepted by the government.

Record, pp. 473, 474.

And if such contract had been made the whole amount of water called for, or used by the Indians, is shown to be only about *two inches*.

Record, pp. 259, 275.

We submit that there is no foundation for the first point, lettered "a."

As to the second point made, it seems to us to be utterly frivolous. The contention is that the water of the defendant was not furnished to the City of San Diego, but to the San Diego Water Company *for* the City of San Diego. This is a distinction without a difference, so far as the merits of this case are concerned. One of the purposes of the organization of the defendant was to supply water to the city of San Diego.

Record, pp. 355, 356.

In its contract with the complainants it was expressly provided that in case of a shortage in the supply of water the City of San Diego, in case the city was "dependent in whole

or in part" upon its system of water works, should have the preference.

See quotation from contract above.

That the City of San Diego was very largely dependent upon the defendant's supply of water, and that some of the people actually suffered for water when the supply was cut off, for the benefit of the complainants, and its other country consumers, is fully shown.

Testimony of Mr. Flint, Record, pp. 354-358.

Barbour's testimony, Record, p. 242.

It is an undisputed fact in the case.

Now, what difference could it make whether the water thus needed was furnished to the city directly or through the agency of another company, having a distributing system within the city limits, thus avoiding the unnecessary expense of putting in such distributing system. But, as a matter of fact, the defendant was furnishing the water directly to the city, and the San Diego Water Company was acting merely as its agent for that purpose. It was so provided by a written contract between the two companies.

Record, p. 345.

And in connection with this contract, and as a part of it, another agreement was made providing for the keeping of the accounts of sales of water, expenses, and a division of profits between the two companies.

Record, p. 346.

The Flume company attempted to escape from this contract, but failed.

Record, p. 313.

San Diego Water Co. v. *San Diego Flume Co.*, 41 Pac. Rep., 495.

This contract is still in force but instead of the cumbersome

methods of keeping the accounts, under the supervision of trustees, an amount to be paid the Flume Company has been agreed upon, which simplifies their dealings and avoids unnecessary expense.

Record, p. 278.

But while the defendant had the clear legal right, under its contract with complainants, to continue to furnish the full supply of water to the City of San Diego, it did not do so. It did everything in its power to protect its consumers in the emergency.

It gave notice to the water company, and to the city, that the resources of the water company must be resorted to, to supply the city, and the supply from the defendant's system would be shut off. It pursued this policy, and withdrew the water from the city, just as soon and as rapidly as it could be done, without causing actual distress, and the water company was driven to the most extraordinary measures in order to supply the city at all and was then only able to supply it very inadequately.

See Mr. Flint's testimony, Record, p. 354, 358.

Mr. Doolittle's testimony, p. 270.

Barbour's testimony, p. 239.

The exact dates when the water was shut off from the city, and the amounts furnished, are stated in the defendant's answer to the bill, and the allegations made with reference to this matter are undisputed, the only contention of the complainant being that the water was not furnished to the city, but to the San Diego Water Company, for the city.

The only reliance the complainants seem to have, in support of their contention that the defendant's water supply was not sufficient, in an average year, is a letter written by Mr. Barbour, its vice-president, to its president, Mr. Sefton. But

the letter was not written in an average year, but was the outgrowth of the very shortage of water that was all too real and apparent that year. The writer was evidently badly affected by the drouth. He was, in common with many other people, crying for more water. He was an advocate of consolidation, and was trying to convince his superior that the emergency was at hand that demanded that something should be done in that direction. But the letter proves nothing at last. The contention that the defendant had violated the contract is wholly unsupported by the evidence and entirely unfounded in fact.

It will not be seriously contended, we think, that there was any such want of care or negligence on the part of the defendant, in the management of its system, as would entitle the complainants to recover. Some small leaks in the flume are shown, but they are insignificant, and such as will always be found in such a structure.

Record, pp. 416, 417.

With this review of the evidence we may pass to a consideration of the questions of law involved, and,

I.

THERE IS NO REASON SHOWN, BY ALLEGATION OR PROOF, FOR RESCINDING OR CANCELLING THE CONTRACT.

The question was argued in our brief on the first hearing, when the original bill was in, and the question of rescission was presented for decision. Counsel contend that the question is still here and a rescission may be had under their answer. We have shown above, we think, that this cannot be so, but the court may take a different view of it and in order that our views may be properly presented we incorporate in

this brief what we said on the former hearing. There are certain material and salient facts disclosed by the pleadings, as they originally stood, and by the evidence now before the court, taken under the issues as they were originally made up, to which we desire to call your attention. They are:

1. That the complainants had *two* contracts with the defendant, each of which called for and entitled them to receive from defendant's system, *fifteen* inches of water, continuous and perpetual flow or thirty inches under both contracts.

2. That with respect to the contract sought to be rescinded the complainants had paid no part of the principal sum of $9,000 agreed by them to be paid for the water right.

3. That the defendant was compelled, by reason of the severe and prolonged drouth, mentioned in the answer, to cut down the supply of water to *all* consumers under its system *one-half*.

4. That this reduction in the quantity of water supplied was made *June 7th*, 1894.

5. That the alleged rescission of one of these contracts, or the notice thereof, was not given until *October* 2, 1894, nearly *four months* after the quantity of water was reduced.

6. That on the 10th day of December following, the defendant was, by the fall rains, again enabled to furnish the full supply of water to its consumers and so notified the complainants, but they refused to accept it.

7. That by delaying to rescind, until the summer season was over, and until they could irrigate their crops, the complainants got the *full* supply of water under *one* of their contracts to the detriment of the defendant and other consumers, and now refuse to pay for the 7 1-2 inches thus obtained because they claim they have not been supplied with the water.

8. That the obligation of the defendant was to supply the

water, continuous flow, and not to store it for use during the irrigation season and the damage, if any, resulting to the complainants, was by reason of their own failure to store the water for use when needed.

9. That by the express terms of the contract sought to be rescinded, it was provided that if the defendant was prevented by *drouth* or the *failure of the average amount of rainfall in the mountains* the land of the defendants should, "*during the period of such shortage*, be entitled to *only such water as can be supplied to and for it after the full supply shall have been furnished to all* cities and towns that are or may be dependent either in whole or in part upon said system of water works for their supply of water for municipal purposes and for the use of their inhabitants."

10. And the contract further expressly provides that the defendant "*shall not be responsible for any deficiency* of water occasioned *by any of the above causes*, but the party of the first part shall use and employ all due diligence at all times in repairing and protecting its said flume and in maintaining a flow of water therein."

11. The evidence does show the greatest care on the part of the defendant in maintaining its plant and supplying the water to consumers.

12. The annual rate to be charged by the defendant for water was fixed by the board of supervisors as provided by law.

Upon the facts as stated we submit that the following principles of law are applicable to the case, and decisive, in favor of the defendant, both as such defendant and as cross complainant.

1. *The case is not one for equitable relief by way of rescission or cancellation.*

a. Because no equitable ground for rescission is shown.

b. Because the contract sought to be rescinded is one for the payment of money, merely, and complainants have an adequate remedy by way of defense to the action.

c. For a failure to furnish the water contracted for there was an adequate remedy by mandamus.

d. Because the failure to comply with the contract by the defendant, if there was a failure, was only temporary and partial.

e. Because the complainants did not act with reasonable promptness in giving notice of rescission.

f. Because the complainants did not restore, or offer to restore, to the defendant what they had received under the contract.

2. *No grounds for rescission are shown;*

a. Because the contract was in no way violated, but was fully complied with by the defendant.

1.

There can be no doubt of the jurisdiction of a court of equity to rescind and cancel a contract upon equitable grounds, such as fraud, mistake or the like, or where such contract is invalid, or wholly void, and such contract is, or is threatened to be, made the foundation of an unjust claim. But in order to warrant the interference of a court of chancery, some of these equitable grounds for relief must be shown. We submit, however, that this case does not fall within the rule contended for by counsel for appellant, for various reasons, first of which is:

a. That it is not shown that the contract is invalid, or void, or was obtained by improper means, or was executed by mistake.

Nothing appears from the bill showing, or tending to show,

the invalidity of the contract, or that it was obtained by fraud or other improper means. The civil code provides, sec. 3412, that a contract, where there is reasonable apprehension that if *left outstanding* it may cause serious injury to a person against whom it is *void* or *voidable* may, upon his application, *be so adjudged* and ordered to be delivered up or cancelled.

Now, here are two elements, both of which must concur in order to give a court of chancery jurisdiction to interfere.

1. The contract, if *left outstanding* will cause serious injury, and

2. The contract must be *void* or *voidable*. And, in order to justify a cancellation of the instrument the court must adjudge that these two grounds exist.

In this case neither the one, nor the other, is shown to exist, either by the allegations of the bill, or by the evidence. It is not pretended that to leave the contract outstanding would work the complainants any injury. The only ground of complaint is that they have been damaged by a partial failure to perform, for the space of four months, one of the covenants in a valid contract, for the performance of which the complainants were bound to pay money only. Therefore there is no ground for relief under the section referred to, and the section is merely a statutory declaration of what the equitable rule was before its enactment.

In *Castro v. Barry*, 79 Cal., 443, cited by counsel, it is said, quoting from *Hibernia S. S. Soc. v. Ordway*, 38 Cal., 681, and after quoting section 3412 supra:

"In an action to remove a cloud, there can be no question but that the facts which show the *apparent* validity of the instrument which is said to constitute the cloud, and also the *facts showing its invalidity* ought to be stated." Page 445.

And again, in the same case, in distinguishing between this kind of action and one to determine an adverse claim, the court says, at page 446:

"The distinction between the two kinds of actions is clear. They are different, not merely in form, * * but in purpose. In the former case the proceeding is aimed at a particular instrument or piece of evidence *which is dangerous to the plaintiff's rights,* and which may be *destroyed in whosesoever hands it may happen to be.*"

And, certainly, it cannot be destroyed in whosesoever hands it may happen to be, on the mere ground that a partial defense may be made against it in whosesoever hands it may happen to be, on the mere ground that a partial defense may be made against its enforcement, or damages recovered for a partial and temporary or any breach of the contract and without any showing of its invalidity, or of any damage that would result from its continued existence.

Ingram v. Smith, 83 Cal., 234, cited by counsel is favorable to our contention. There the ground for cancellation was that the note was fraudulent and might be transferred to an innocent holder, against whom the defense could not be made.

We challenge counsel to point out a single allegation in their original bill, even tending to show the invalidity of the contract, or that will, in any way work the complainants an injury if not cancelled. The bill has none of the elements of a bill to cancel or rescind an instrument. With the exception of the allegation that they *did* rescind the contract, and a *prayer* that it be cancelled it would not be suspected that the bill was filed for any such purpose. There is no allegation in the pleading "showing the invalidity of the contract," nor are any facts stated from which its invalidity can be inferred. On the contrary they insist upon its validity

and seek to recover damages *for its breach.* There is no allegation that the contract creates a cloud upon the complainants title to their lands or any allegation, or attempt to show, that any injury will or can result to them if the instrument is not cancelled, nor even an allegation that the defendant is making any claim under it against the complainants. In short there is not a single allegation in the bill which could give a court of chancery jurisdiction to interfere. As we said before, there is not a single element in the bill that should be contained in a bill for the rescission and cancellation of an instrument. Aside from the prayer for relief it is a common law action for damages, for a breach of contract, and nothing more. Their bill having been dismissed on the first hearing, we must look to their answer which alleges no ground for rescission and contains no prayer for such relief.

In all the cases cited by counsel, in support of the jurisdiction of a court of equity to cancel an instrument, one or the other of the grounds of exclusive equitable jurisdiction, viz: fraud, mistake, or the like, were shown. In the absence of such a showing there is no ground for equitable relief.

Pom. Eq. Jur., secs. 110, 188, 221, 870, 899, 910, 915, 1377.

Globe Mut. Life Ins. Co. v. Reals, 79 N. Y., 202.

Ryerson v. Willis, 81 N. Y., 277.

Chicago T. & M. Ry. Co. v. Titterington, 19 S. W. Rep. 472.

Here there is neither pleading nor evidence to support any such relief.

b. The contract is one for the payment of money, only, and the appellants had an adequate remedy at law.

We have shown that no ground for cancellation is alleged

in the original bill, nor in the answer. But if there had been this equitable proceeding cannot be maintained because the appellants had an entirely adequate remedy at law. This was a contract which, so far as appellants are concerned, renders them liable for the payment of the price stipulated to be paid for the water right, and the annual rental for the water when delivered. Even where fraud or mistake is alleged a court of equity will not interfere, where a defense may be made at law, unless the instrument is one, valid on its face, and may be transferred to an innocent holder in such way as to cut off the legal defense.

Pom. Eq. Jur., sec. 221, p. 224; secs. 911, 1377.

Globe Mut. Life Ins. Co. v. Reals, 79 N. Y., 202.

Fowler v. Palmer, 62 N. Y., 533.

Hamilton v. Houks, 1 Johns. Ch., 517.

Kelly v. Christal, 81 N. Y., 619.

Kimball v. West, 15 Wall., 377.

Hepburn v. Dunlap, 1. Wheat., 179, 196.

True v. Loring, 120 Mass., 507.

Travelers Ins. Co. v. Redfield, 40 Pac. Rep., 195.

Stewart v. Mumford, 80 Ill., 192.

Insurance Co. v. Bailey, 13 Wall., 616, 620.

Hipp v. Babin, 19 How., 271, 277.

As shown by the case last cited, it is expressly provided by the judiciary act "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain adequate, and complete remedy may be had at law."

See also Appeal of Travis, 8 Atl. Rep., 601, 606.

And if the invalidity of the instrument appears on its face it cannot be cancelled because it can do no injury.

Civil Code, sec. 3413.

c. For the failure to furnish the water contracted for there was a complete and speedy remedy by mandamus.

As we have said, the complainants had an adequate and speedy remedy, if any attempt should be made by the defendant to enforce the contract. On the other hand the only ground of complaint in the bill is that the defendant had refused to furnish the water contracted for, and had wrongfully diverted the water from the appellants' lands, and supplied it to others not entitled to it, as against the appellants; and, especially, that it had wrongfully supplied water to the City of San Diego. If this were the case, and, as we say, it is their only ground of complaint, they could at once have procured a writ of mandamus and have compelled defendant, thereby, to turn on the full supply of water to which they were entitled.

Price v. Riverside L. & I. Co., 56 Cal., 431.

And, if a party has a speedy and adequate remedy by any of the extraordinary proceedings at law, as, for example, *mandamus* or *certiorari*, he must resort to such remedy.

Barber v. West Jersey Title &c. Co., 32 Atl. Rep. 222.

Jackson v. Mayor &c., 31 Atl. Rep., 233.

Burgess v. Davis, 28 N. E. Rep., 817.

Bodman v. Drainage Com'rs, 24 N. E. Rep., 630.

Van Natta-Lynds Drug Co. v. Gerson, 23 Pac. Rep., 1071.

Heywood v. City of Buffalo, 14 N. Y., 534.

No more speedy and adequate remedy could be devised in case of the wrongful diversion of, and refusal to furnish, the water. The course taken by the appellants furnishes the most ample proof that their object is, not to obtain their rights under the contract, but to find some excuse for evad-

ing the payment of the amount agreed to be paid for the water right.

d. The failure of the defendant to comply with the contract, if there was a failure, was only partial, and temporary.

Conceding that there was a breach of the contract, on the part of the defendant, which we will show, further on, there was not, it was only a partial and temporary failure and gives no ground for equitable relief. It was merely a failure to deliver a part of the water contracted for and shows no intention on the part of the defendant to abandon the contract.

Travelers Ins. Co. v. Redfield, 40 Pac. Rep. 194.

Powell v. Berry, 22 S. E. Rep., 365.

Woolen v. Walters, 14 S. E. Rep., 734.

Gomer v. McPhee, 31 Pac. Rep., 119.

Gill v. Johnstown Lumber Co., 25 Atl. Rep., 120.

Blackburn v. Reilly, 1 Atl. Rep., 27 .

Burge v. Cedar Rapids &c. R. R. Co., 32 Ia., 101.

It was a breach that could be fully compensated for in damages and by the enforcement of the contract; and, therefore, a court of chancery will not cancel the contract.

Travelers Ins. Co. v. Redfield, supra.

Kimball v. West, 15 Wall., 377.

The failure was simply to furnish a given quantity of water for the space of four months, for which a given price was to be paid, which brings the case clearly within the rule established by the authorities cited. The evidence shows that within two months after the notice of rescission was given the defendant was ready and offered to again furnish the full supply of water but the plaintiff refused to accept it.

Record, pp. 30, 31, 157, 186, 190, 191.

e. Because the appellants did not act with promptness in giving notice of rescission.

The appellants did not rescind the contract immediately on the supply of water being reduced. By no means. They held on and got the 7½ inches, or one-half the quantity of water, until their grapes could be irrigated, and then, after the water had been cut off for *four months*. They claim now that they were entitled to fifteen inches under the other contract and that they were taking that water only. But, if so, they were getting it under false pretenses, and robbing other consumers of their *pro rata* share of the water. Under this first contract they were only getting one-half of their supply and the same under their second contract. Why did they not rescind both contracts, as one was violated if the other was, and to the same extent. The reason is apparent. They owed the entire $9,000 due for the water right under the contract they are attempting to have rescinded, and are attempting, under a most flimsy excuse, to avoid the payment of an honest debt. And in order to get all they possibly could out of the defendant they took all the water they could get from both contracts, during the whole summer season, when other consumers, who were willing to share equally with their neighbors, and pay for what they got, were suffering in common with them, and did not think it best to rescind the contract until they had got all that was to be had during the summer when it was needed. They could well afford to do without the water after the summer was over. The evidence shows that they only bought water enough under both contracts to irrigate a part of their lands. And it is quite evident that their sole and only object, in their attempt to rescind this contract was to avoid paying for the water. Mr. Donald, the foreman of complainant, is asked to explain why this course was taken but is unable to do so.

Record, p. 133.

f. Because the appellants have not restored to the defendant what they had received under the contract.

We need not cite authorities to establish the rule that a party who seeks equity must do equity, or that a party who seeks to rescind a contract must place the other party in *statu quo,* by restoring to him all the benefits that have been received under the contract. This has not been done, nor offered to be done in this case. What was it the complainants purchased? It was a water right to fifteen inches of water. For this right to the use of the water they agreed to pay $9,000. So far as the conveyance of this water right is concerned the contract was fully executed and the right was attached to the lands of the appellants, not only by the contract, but by the actual delivery of the water on the land, which, under the code, gave them the right to the continued use of the water. ,

Civil Code Cal., sec. 552.

Under this water right, so vested in them, they received the water for irrigation from March 12th, 1890, until June 9th, 1894. They do not tender any reconveyance of this water right which is vested in them both by contract and by operation of law, nor do they offer to pay anything for the time they have enjoyed the benefits of the water right by receiving the water under it. They say in their bill that they will reconvey the water right but they make no tender of a conveyance. And as their bill has been dismissed there is no such offer or foundation for rescission under their answer. They contracted to pay $9,000 for this water right, in addition to the rental agreed to be paid for the water itself, as used. Therefore the water right must be regarded as valuable. Not only so, but, for the water they actually received, they have not paid in full. According to their own

notice of rescission they have only paid for water up to *May 1st, 1894*. They received and used their full supply of the water up to June 9th, 1894, and a *one-half* supply up to December 8th, 1894, *two months* after they gave notice of rescission. For all this water received, and used, after June 9th, they have paid nothing, and offer to pay nothing. They very generously offer to let us keep $2,250.00 which they have paid us for water actually received, and used before that time, but as they got full value from that water we submit they were simply offering to give us our own money for the water they admit they received and never paid for. But as an offset to this apparent generosity, they demand that we repay them the interest paid by them on the amount due us when they were actually using the water.

Record, p. 40.

They claim, of course, that after June 9th, 1894, they were receiving *all* the water that was being furnished, under the other contract for fifteen inches, but the defendant had, on the 9th day of June, notified them that it could only furnish one-half the full supply, after that date, under all contracts, and to all consumers. So the appellee was actually furnishing 7½ inches under the contract they sought to rescind and the same amount under the other. The complainants had no right to elect to take *all* the water under one contract and *none* under the other, and to rescind the one contract on the theory that it was not being complied with and to hold onto the other on the theory that it was being fully performed.

See notice of defendant of reduction in amount of water to be furnished . Record, p. 303.

And complainants' notice of rescission, p. 304.

Also notice that full supply would again be furnished. p. 307.

And the complainants' refusal to receive it under one of the contracts.

And the defendant's refusal to recognize the rescission, and notice, that it will collect the rentals for water, p. 308.

But conceding that this is a case in which a court of chancery might properly entertain jurisdiction if sufficient grounds were shown therefore, we maintain that no ground whatever has been alleged or proved for the rescission of the contract. As we have said, the sole and only ground of complaint is that there was a breach of a contract to furnish a certain amount of water. While maintaining, that if true, this is not a ground for rescisson, but for an action at law for damages, we propose to show that there was, in fact, no breach of the contract. While the contract obligated the defendant to furnish fifteen inches of water there were certain excepted cases in which it was not to be so bound, and in which, if it failed to furnish the full supply, it was not to be held responsible. The provisions upon which we rely, as excusing the defendant for the failure to supply the full quantity of water, and exempting it from liability if it does so fail, are set out in full above.

The evidence brings the case clearly within these exceptions. Therefore, if the answer contained the same allegations that were set out in the original bill there would be no ground whatever for a rescission of the contract. But as we have shown, the answer contains no allegations upon which a claim for such relief could be founded and none is asked for. Again, this question was definitely settled by the decision of the case on appeal. The original bill was not before

this court, but the cross bill and answer were. And the appellants contended, in this court, as they do now, that they were entitled to a rescission of the contract. The court below had held that they were not entitled to a rescission of the contract because it was void and they needed no such relief. On appeal they contended that the case was one for rescission, conceding that the court was wrong in its conclusion that the contract was absolutely void, and, therefore, the cross complainant was not entitled to a reversal of the decree dismissing its cross bill because they were entitled, under the evidence, to a cancellation of it, and the right result had been reached by dismissing the cross bill to enforce the contract.

It was to this contention that this court was addressing itself in discussing the question whether this was a case for a rescission or not. Clearly the decision covers the point and decides it adversely to the appellants. And as the pleadings have not been changed and no additional evidence has been taken the decision is the law of the case. However, whether it is or not, we think this court will have no doubt as to the correctness of the decision. We need not enter upon a review of the authorities cited by counsel on this point. Their whole argument is based upon their unwarranted claim that there was a total want of performance on the part of the company, when, as the undisputed evidence shows, they had the full use and benefit of the water contracted for, for four years; that they were only cut down to a one-half supply made necessary by the extraordinary drought, and that they were, after six months, again offered a full supply and refused it. To say that under such circumstances they can repudiate the entire contract and have it rescinded is to our minds nothing short of absurd. Counsel do cite some author to the effect that a contract may be rescinded

for a partial failure to perform. Doubtless cases may arise where the partial want of performance is such that it would be inequitable to enforce the contract as against the other party to it. But this cannot be so where the breach complained of can be compensated in damages and the balance of the contract remain intact as to both parties to it. And in any case, where there has been a partial performance, and the complaining party has received something under the contract he must, as a condition upon which, alone, he may rescind, restore what he has received and place the other party to the contract in *statu quo*. We have shown above that in this case nothing of the kind has been done. Amongst other cases cite to the proposition that a partial failure to perform will warrant a rescission is Richter v. Union L. & S. Co., 129 Cal., 367, lately decided by the Supreme Court of California. But in that case the failure was not partial but total. The contract was executory, entirely; no water at all was ever furnished under it, and it was expressly held by the court that the water right agreed to be conveyed was worthless and therefore the promise of the respondent without consideration. What was said about a rescission on account of a partial failure to perform was the purest *dictum*. And it will be seen that the court in using this language confined it to executory contracts. The decision can have no weight in a case like this where a contract is not executory and has been fully performed for a number of years and where the water right has actually vested in the complainants and become appurtenant to their lands. It will be seen, upon an examination of the other cases, that the right to rescind, for a partial failure to perform, is placed upon some equitable consideration of the court, or where that portion of the contract not performed is a *condition* express or implied to performance by the other

party, and most of them where the consideration is personal services involving peculiar knowledge and skill.

Watson v. Ford, 93 Fed. Rep. 359.

The cases of Farmers' L. & T. Co. v. City, 133 U. S., 156, and Capital City W. Co. v. State, 105 Ala., 406, 29 L. R. A. 743, are so essentially different from this case as to deprive them of all weight upon the question under discussion. There, there was an unqualified obligation on the part of the person or company to supply the water, while here there was an exception, as we have shown, to the effect that the company should not be held liable for failure to supply the full quantity of water, if prevented by extreme drought, and it was, as we shall show further along, upon this very ground that the learned judge of the court below held that the answer of the appellants and the evidence submitted under it showed no defense to our cause of action. It is unnecessary to undertake to review any of the authorities cited by counsel on the other side, for this very reason. If there had been an unqualified agreement on the part of the company to furnish the water, and it had failed, and damage had resulted to the appellants, an altogether different case would have been presented. It would not, as we have shown, have entitled them to the rescission of the contract, but it would doubtless have entitled them to damages for the injury resulting. But this case does not turn upon that question. It was decided in the court below, and must be decided here, upon the ground either that the contract did excuse the appellee from furnishing a full supply of water on account of the drought, or that it did not. The court below held that the contract did excuse the appellee, and that is the only real question here for determination.

We submit that there is nothing in any of the cases cited

by counsel that would justify a court of equity in rescinding a contract under the conditions shown here.

II.

THE DOCTRINE FIRST IN TIME FIRST IN RIGHT CAN HAVE NO APPLICATION IN THIS CASE.

Counsel have undertaken to invoke the doctrine "first in time, first in right" in aid of their defense. This is a question of extreme gravity and transcendant importance, not to the parties now before the court, alone, but to all water companies engaged in distributing water to the public and above all to the consumers of water taken from such companies and dependent thereon for the irrigation of their orchards and their crops. Counsel on the other side have chosen to treat the subject lightly,, and characterize our claim that there is no priority of right as between consumers taking water from a company like the defendant as absurd. This may be so but if it is we must be allowed to consider it a great misfortune. If this doctrine does prevail, as a part of the law of this state, and water takers had so understood it and enforced their rights, more than half the orchards in Southern California dependent for their supply of water upon companies storing water for rental and distribution would have gone to absolute destruction within the last three years. But, so far as we know, the appellants in this action are the only consumers that have asserted any such right. On the contrary, in every instance that has come under our observation the consumers themselves, as well as the companies, have seen the absolute necessity of an equitable and pro rata distribution of what water could be had; and they and their attorneys have had the good sense to co-operate in an endeavor, in this way, to save the orchards of *all* owners.

This court will take judicial knowledge of the history of the state and the conditions that have prevailed during the past three years. The year 1894 was an excessively dry year the like of which had not been seen in Southern California for twenty years or more. The result was a general failure of water companies to furnish a full supply of water. But the worst had not come. For the three last years an unprecedented drought has prevailed. Companies wholly dependent upon stored water have had practically no water at all for distribution except where they have, by extraordinary efforts, and much expense, created a new supply by underground pumping. This has been done by the defendant, by which consumers under its system have been saved and have produced good crops. But for much of the time the company has been able to supply only *one-fourth* of the amount of water its consumers were entitled to receive under their contracts. The history of conditions prevailing in the section watered by the San Diego Land and Town Company, including over four thousand acres of orchards has been practically the same. As to these communities we speak from actual knowledge. We understand conditions have been much the same in other localities. Now what would have been the result if the law is as counsel contend for it and the law had been enforced? It would have been most disastrous. It would have left three-fourths of these orchards without any water at all and they would have perished.

This court may feel itself impelled to declare and enforce such a doctrine otherwise, surely, it will not do so.

But where is the law declared, either by the constitution or any statute of the state, or by any decision of any court, that leads to any such conclusion? The court below has come nearer foreclosing this question by its own decisions than

has any other court. These decisions are appealed to by counsel on the other side as conclusive of the question. They are:

Lanning v. Osborne, 76 Fed. Rep., 319;

San Diego Land and Town Co. v. Sharp, 97 Fed. Rep., 394;

Mandell v. San Diego Land and Town Co., 89 Fed. Rep., 295.

It so happens that we were connected, as attorneys for the San Diego Land and Town Company, with all of these cases and we are in position to say that in none of them was the question of priority of right between consumers taking water from the company in any way involved, nor did the question of the rights of such consumers, in case of a shortage of water arise.

We desire to point out, briefly, what the questions were, and to what extent they should be taken as authority when the question of priority of right is presented.

In Lanning v. Osborne the sole and only question involved was whether the company had or had not the right to increase its annual rates for water. It was maintained by the consumers that it had no such power for two reasons, viz., because it had already fixed and established a rate that must stand until changed by the board of supervisors and because it had contracted with consumers for water rights in such way as to estop it from changing the rate. This is clearly shown by the statement of the question by the court in the opinion. After setting out, quite fully, the allegations of the pleadings the court said:

"Copious extracts have thus been taken from the answer to show the grounds upon which it is strenuously contended the water in question must be continued to be furnished to

the defendants for irrigation at the annual rate of $3.50 per acre.

Page 328.

And the statement by the court of the doctrine first in time first in right was a mere passing remark made in commenting on a Colorado case involving the right of a consumer of water to prevent the company from selling more han it could supply, to his injury; a right that no one can reasonably question. This case cannot be treated as a decision of this question. And the court will take notice of the fact that no such question was argued or presented.

The same thing is true of the Sharp case. There a special contract had been made between the company and Sharp by which he was to have a certain quantity of water from the system of the company for a limited time, five years, in which contract Sharp, in terms, waived his right to claim the water perpetually under Section 552 of the Civil Code. The company claimed that it had made the contract limiting the time it should serve Sharp's place because it was at a high elevation and difficult to supply and as the number of consumers of the company increased it would be impossible to supply his land without depriving a much greater area of land, on lower levels, of a water supply.

The court held the special contract to be void and that, as the water had been once supplied to his land Sharp was entitled to its continued use, and that the fact that his land could only be served with difficulty and to supply it would deprive a greater area of more favorably situated lands with water could not affect his legal right to its continued use. There was no question whatever of priority of right as between him and other consumers, or of the right of later takers of water to pro rate with him in case of a shortage. The

language of the court, at the close of the opinion, might indicate that such a question was involved but it was not. The sole question was whether he had any legal claim to the water, as against the company, not as to the extent or priority of his right as against some other consumer if he was entitled to water. The case of San Diego Land and Town Company v. Sharp, cited by counsel, was the same case on appeal to this court, and of course involved the same question. This court did not pass upon the question of the validity of the special contract but held that as the contract was for a limited time and that time had expired it was no longer of any force, and as the water had been supplied to Sharp's land he was entitled to its continued use under section 552. The only ground for claiming this decision as supporting this contention is that it quotes with approval the closing language of the the opinion of the Circuit Court, to the effect that to allow the water to be taken from Sharp's land and supplied to other lands more favorably situated would be in violation of the well established rule that in cases like this the first in time is first in right.

We hope to convince the court that in a case like the one at bar there is no such rule.

The case of Pallet v. Murphy, 63 Pacific Rep., 366, is also cited. We do not understand why. The writer of this brief was one of the attorneys in that case and this is the first time it was ever intimated that there was any such question there as is now presented. There certain tenants of land claimed the right to water from the defendants' ditch by virtue of a deed of their lessors of a right of way for the ditch, in which it was provided that they should have water from the ditch on as favorable terms and conditions as it was supplied to others. The defendant had sold permanent water rights to

a part only of his water supply. The surplus was sold, to whoever applied for it, at a fixed price per hour. The only question was as to which class of consumers the plaintiffs belonged. At the time application was made for the water the surplus had all been taken and the defendant claimed that the plaintiffs stood on the footing of other takers of surplus water and had no permanent water right. In his first decision of the case Judge Shaw of the Superior Court held that the grantors of the right of way for the ditch, and lessors of the plaintiffs acquired a permanent water right. On motion for a new trial he modified and changed his holding so as to find that the plaintiffs were entitled to water, as against mere transient takers by the hour, and that such contractors for a temporary use of the water must take notice of this right given by the deed. And this was all that was decided both in the court below and on appeal to the Supreme Court. The question of priority of right, in the sense in which it is sought to be raised here, was in no way involved in the case.

So, we respectfully submit, that this is an open question to be decided on its merits and if it is presented here should not be determined by any previous decision of this or any other court.

This being so let us inquire what is the law on this important question. That a purchaser of a water right has a tangible right to the water no one else should deny. That, in some cases, his priority in time of purchase or other acquisition of this right may be asserted and enforced we entertain no doubt. But under what circumstances, and against whom, is the material question as it affects the case at bar. And this involves the broader question of the nature and extent of the rights of a water company like the defendant in the water it

appropriates to public use. The law is, undoubtedly, that such a company is the mere agent for the delivery of the water to lands under its system, at least to the extent that the owners of such lands may compel it to supply their lands, to the extent of its ability to do so, with the water it has appropriated, but no farther.

Lanning v. Osborne, 76 Fed. Rep. 319;

Price v. Irrigating Co., 56 Cal. 431;

People v. Stephens, 62 Cal. 209.

But the question here is does each of the land owners to whom a water right is sold, or water furnished under section 552 of the Civil Code, become the owner of a water right for the amount of water purchased or applied to his land in the order of time of such acquisition of the right, to the exclusion of all subsequent takers, or do they become the owners in common of all the water and entitled to share it equally, bearing, in proportion, the loss, if any by extraordinary conditions resulting in a shortage of the water supply of the company. In dealing with this question we should not be trammeled, in any way, by reason of the well settled rule that, as between private appropriators of the waters of a stream, the doctrine "first in time first in right" does prevail. The cases are in no proper sense parallel cases. There there are as many separate appropriations and owners as there are users from the stream. But where the appropriation is made by a water company, for public use, there is but *one* appropriation for all who may thereafter be supplied with water under that appropriation. And, this being so, by what right may one of the many for whose benefit the appropriation was made say my rights are superior to my neighbors, supplied later, because I was supplied *first*. There can be no reason whatever. To illustrate: A company appropriates

five hundred inches of water for the public use. There are twenty-five hundred acres of land under its system to be supplied with water. This would give them one inch to five acres which ordinarily would be ample for their needs. The company commences to construct its system and supplies the lands, as it reaches them. Does counsel mean to say that under such circumstances the man that receives water one day has a superior right to the one that is supplied the next day and so on down the line, and that if, while of an ordinary or average season all could be supplied the full amount, a dry year should come along when the company could only furnish two hundred and fifty inches of water, the first twelve hundred and fifty acres must be supplied in full and the balance take nothing? And in such cases, laying aside all questions of contract liability, for the moment, could the company be held liable for damages for the total failure to supply the half of the land last furnished with water in the beginning? That is the doctrine contended for by counsel. Is it just? Is it good law? We maintain, with confidence, that no such doctrine can or should prevail. The company appropriates five hundred inches of water. It is one single appropriation. Every right to the use of any part of that quantity of water derived from the company, either by contract or the mere application of the water to the land, relates back to and is a part of that single appropriation of the whole. The taker of water from the company takes his proportionate share of that one water right, in common with other takers from the company, and without priority. This seems to us to be so manifest as to need no support by argument. And any other rule would be most disastrous to both the company and its consumers. As we have shown above its enforcement, as contended for, the last three years

would have destroyed more than half the orchards in Southern California. And, while the courts cannot be swerved from a right construction and enforcement of laws by the fear, or certainty, of disastrous consequences such consequences are proper to be borne in mind where the proper construction of law is doubtful.

As we have said we are without authority on the subject. But the distinction we are contending for, between the case of one who diverts water from a running stream and one taking water from a company like this, that has made such diversion, is clearly recognized in some of the cases in Colorado:

Farmers High Line Canal & Reservoir Co., v. Southworth, 21 Pac. Rep. 1028;

Wyatt v. Larimer & Weld, Jr., Co., 29 Pac. Rep. 906.

In the first case cited Chief Justice Helm said:

"Under the constitution, statutes, and decisions, as I read them, the consumer takes with full knowledge that the carrier's entire diversion will ripen into valid appropriations, provided the water be applied within a reasonable time to beneficial uses. He also takes with knowledge that the different lawful co-consumers will have the same priority, a priority resting for its commencement upon the carrier's diversion, or dating from a subsequent enlargement of the quantity of water to which the carrier was originally entitled. He must therefore be presumed to know that in times of scarcity his use may be subjected to two interruptions, viz: *First*, that canals and ditches holding priorities antedating the diversion of his carrier may demand all the water in the natural stream, so that there will be none for him or any of his co-consumers; and, *Second, that if there is water, but not the full quantity appropriated he will be obliged to prorate with such co-consumers.*

* * * *

I would conclude this opinion here were it not for the fact that others, including one of my colleagues on the bench, are firmly convinced that the foregoing construction of the

constitution is unsound. *They contend that the constitution guarantees to each consumer a priority dating from the commencement of his individual use.* The carrier's original diversion, say they, has nothing to do with the consumer's priority; it is as if the consumer, at the date of his use, made a distinct and independent diversion from the natural stream, merely employing for the purpose the carrier's canal; and upon this constructive diversion rests the superstructure of their theory regarding the consumer's appropriation and priority. To what has already been said may be added the following considerations which preclude the adoption of this view:

I. It is wholly impracticable, and hence it would operate to defeat the beneficent purpose of the constitutional provision upon which reliance is placed. The protection awarded in connection with a consumer's constitutional priority, extends to controversies between him and all his co-consumers, though their number be legion; but the assertion of his rights cannot be limited to such controversies. He is necessarily entitled to the quantity of water covered by his appropriation as against all others obtaining water at a later period, directly or indirectly, from the same natural stream. The priorities of all appropriators from a given natural stream whether employing carriers or constructing private ditches, must be adjudicated, and the prior right of each must be sustained. The total number of ditches taking water from a natural stream may be 100; the total number of persons receiving water through these ditches may aggregate 5,000. There are already in the state carriers who each supply several hundred consumers. No serious difficulty would be encountered in adjudicating priorities as between the 100 ditches; but to the satisfactory adjustment and maintenance of separate priorities belonging to the 5,000 individual consumers all the available judicial machinery, if it did nothing else, would prove inadequate. Not only must there be a priority for each consumer corresponding, according to the view we are now considering, with the date of his first application to use, but there must also be an additional priority for each subsequent enlargement of the quantity of water taken by him. Besides, certain consumers will abandon the use of water from the carrier, and other consumers will secure the right to the use thus abandoned. In each case of this kind the old priority

must be dropped, and the new priority recognized. This new priority then becomes a factor in readjusting the 5,000 priorities. Nor is the quantity of water appropriated at all sufficient. The appropriation, whether it be enough for 5 or 500 acres, is to receive precisely the same recognition. Moreover, all these priorities are to be accurately determined, as well as impartially protected. They depend upon the dates of the respective applications to use, and these dates must be ascertained with reference, not merely to years nor to months, not even to weeks, but also with reference to days. There is no exaggeration in the foregoing; for, if the constitution gives each consumer a priority from the date of his individual use, the legislature can adopt no rule that shall prevent the assertion of this constitutional right. That body, under the supposition mentioned, has no power to say that a consumer from the same or another canal, who began using a month, a week, or even a day, later than he, shall be has equal in this regard.

* * * *

Any consumer has under this view the constitutional right to call for a re-adjustment of priorities based upon the date of his individual use. In such case not only must the re-adjustment assign to him a priority with reference to his co-consumers, but the re-arrangement of priorities must also include the consumers from other canals, as well as individual appropriators, from the same natural stream; for, as already suggested, the alleged constitutional right of the consumer, if it in fact exists, cannot be confined to controversies with those taking from the same artificial stream. It relates to the natural stream, and he must be permitted to contest priorities with all parties taking directly or indirectly therefrom. To avoid, at least in part, the foregoing disastrous consequences, an ingenious theory is advanced. It is gravely argued that we have in this state a double system, more properly speaking, two systems, of priorities. The police power of the state is appealed to. It is said that the legislature has, as a police regulation, directed the ascertainment of priorities as between the canals and ditches themselves; and it is also asserted that the supposed constitutional priority of the individual consumers is at the same time recognized and protected; that is to say, a system of priorities based upon the dates of diversion by the canals and ditches co-exists with a system of priorities resting upon the dates

of use by the individual consumers. Through the former system, it is maintained, confusion and conflict in the diversion by canals and ditches are avoided, and an orderly apportionment of water is secured, while by the latter system the constitutional rights of individual consumers are recognized and enforced. This theory reads well, but the feasibility of its practical application must be doubted. Unfortunately both systems must be applied to the same identical water at the same identical time; that is, a canal prior in diversion is under one system to receive its 1,000 inches of water, while the consumer prior in use from a canal later in diversion is, under the other system, secured precedence of 500 of the same 1,000 inches of water. But how can the prior canal and the ealier consumer from the later canal, both take at the same time the same identical water? This crude illustration shows the utter impracticability of the theory. The two systems are in hopeless conflect. The supposed statutory priority of the consumer supersedes the supposed statutory priority of the canal, and whenever the arrangement of the consumers' constitutional priorities conflicts with the arrangement of the carriers' statutory priorities, the latter must inevitably give way. It seems to me that the statutes themselves tend largely to negative the double system priority theory. In the *first* place, as we have seen, they provide for the adjustment of ditch and canal priorities with reference to their respective diversions; *secondly*, they do not provide for settling the consumers' separate priorities dating from their respective uses, nor do they make any reference thereto; and *thirdly*, a right on the part of consumers to be heard upon the adjudication of the canal priorities is carefully asserted. If the consumer's reliance is upon a constitutional priority dating from his individual use, it can matter little to him what priority be assigned to the carrier's diversion. His priority of right and consequent interest are neither benefitted nor injured by the priority of his carrier. Why should the legislature be so neglectful of his real welfare, and yet so carefully extend to him a privilege and a power so useless to his personal interest or advancement? Do not these things tend to show that the legislature recognized the consumer's appropriation as resting upon the carrier's diversion for its priority, and that for this reason that body not only intentionally abstained from reference to a separate priority, but also inserted the very equitable command that before such rights

were determined the consumer should have his day in coudt? Objections to the view under consideration might be multiplied, but the foregoing are amply sufficient to demonstrate that the framers of the constitution anticipated no such construction of the language employed.

* * * *

There is no force in the argument that the construction contended for is necessary in order to prevent carriers from contracting to carry more water than they have a right to transport; nor is the suggestion more pertinent that without such construction the carrier will collect the annual rates for carriage from consumers, put the money in its coffers, and then say that it cannot deliver the water. In the *first* place, a contract to carry more water than has been lawfully diverted, would be unlawful; and to prevent injuries resulting therefrom, or to recover damages in case the injuries are suffered, ample legal remedies exist; and, *secondly*, whether in times of scarcity the water available be distributed equitably among all its consumers, or whether it be delivered to a small number thereof, is a matter of no interest to the carrier. In the absence of statutory regulation it will continue collecting its rate for transportation at the beginning of the season, and then, if there be a scarcity, will refer the complaining consumer who receives no water, or a diminished quantity, as the case may be, to the decision of this court for authority in support of its action."

This leads us to inquire what right the consumer of water has and how he may protect such right? That he has no priority or right over any other consumer *lawfully* contracting for, or receiving water, from the company is manifest. His right, in common with every other consumer, is to prevent the company from contracting to deliver, or delivering, water in excess of the capacity or duty of its system, of an ordinary or average year, and under normal conditions.

Lanning v. Osborne, 76 Fed. Rep. 319;

Farmers High Land Canal and Res. Co. 21. Pac. Rep. 1028;

Wyatt v. Larimer & Weld, Jr., Co. v. Southworth, 29, Pac. Rep. 906;

Wyatt v. Larimer & Weld, Jr., Co. v. Southworth, 33, Pac. Rep. 144.

And this must rest upon the ground that sales of water rights for water, or the delivery of water, in excess of the capacity of the company to supply the water, under ordinary conditions, in invalid and not because of any priority of right between valid holders of water rights from the company.

The doctrine is correctly and accurately stated in Lanning v. Osborne except that it may be inferred from the language used that the consumer's right was founded upon his priority over all other takers, after him, and not alone those persons to whom unlawful sales had been made. It is said page 334:

"Of course, no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so much so that in Colorado it is held, and properly held, that a consumer that settles upon and improves land by means of water appropriated and distributed under and by virtue of the constitution and laws of that state, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system, so as to endanger the supply of those whose rights have already vested, and upon the faith of which they have invested their money and made their improvements. Wyatt v. Irrigation Co. (Colo. Sup.) 33 Pac. 144. In California the same right is secured to the consumer by statute, as well as by judicial decision. It has already been seen from the reference made to the case of Price v. Irrigating Co., 56 Cal. 431, and Merrill v. Irrigating Co. (Cal.) 44 Pac. 720, that the right of the consumer to demand of the corporation a supply of water pre-supposes a sufficient supply for the purpose under the control of the company; and by the provisions of section 552 of the Civil Code of California a consumer whose rights have once vested is protected from the injury of having his supply of water cut off, for it in terms declares him entitled to the continued use of the water upon the

payment of the rates established as required by law. Necessarily growing out of this right to the continued use of the water which he has acquired as a perpetual easement to his land, is the right of such consumer *to prevent, by injunction, if need be, the distributor from disposing of or attempting to furnish others beyond the capacity of the system, thereby imperiling the rights of those already vested.* So long, however, as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the rate fixed for supplying it."

Then, the company has no right to sell water in excess of its ability of an ordinary year to supply it, and one purchasing, or otherwise acquiring a water right from the company must take notice of the fact. And, so far and no farther, have the first takers of water, up to its capacity to supply it, a valid right and prior right to the water.

But right here arises the question as to the proper measure of the capacity or duty of the company's system. Is it the water it can store and deliver in an extraordinarily wet season or what it can supply of an extremely dry year or succession of years? We maintain that it is neither the one nor the other. To allow the company to sell, or in any other way obligate itself to deliver, all the water it could supply following an extraordinarily rainy season, would be unjust to the consumers, because they must, if compelled to pro rate, never receive their full supply except in or following such a season. To limit the right of the company to sales of water rights equal only to what it could supply in or followng an extremely dry season or succession of dry years, would be equally unjust to the company and to the community. To hold it liable in damages for a failure to render a full supply of water during such a year would ruin any company doing business in Southern California and render its water system practically

worthless to the community it is organized to serve. This must be so, because, under section 552, if it once puts water on the land, for irrigation, it is legally bound to furnish the water, forever after, or suffer the consequences. Therefore, if counsels contention is correct the company would not dare to furnish more water during any year than it could supply during the dryest year. And if counsel are right in their contention that a company is bound absolutely and under all conditions by such a contract as the one in controversy to furnish the consumer taking water under it with a full supply of water every such company would have been completely ruined during the past three years.

But we do not apprehend that any court will ever hold to any such doctrine. Some reasonable measure of the capacity of a company, beyond which it cannot legally contract for water—some reasonable measure or limitation of its obligation and ability in case of a failure to furnish the full supply of water in case of a drought—must be established. We submit that this can be done only by taking the amount of water that can be depended upon of an ordinary year, or a succession of ordinary years, and confining the company, in its sales of water, to such quantity as can be supplied by it under such ordinary conditions. As a result the consumers under the system would be bound to pro rate in case of a drought and the company would not be liable for the shortage under such circumstance, in the absence of negligence or want of diligence on its part. In no other way can the waters of the state be properly conserved and brought to beneficial uses.

III.

CONCEDING THE RULE FIRST IN TIME FIRST IN RIGHT TO PREVAIL BETWEEN TAKERS OF WATER FROM A COMPANY LIKE THIS THE DEFENDANTS HAVE SHOWN NO SUCH RIGHT.

We have undertaken to show that no priority of right can exist, as between holders of legal water rights acquired from the same water company. But, if we are wrong in this, we maintain that the complainants in this case are in no better condition, on that account. If there is such priority the burden is upon them to show their priority over the other consumers. This has not been done, as we have shown above, either by their answer or by the proof. It is clearly shown that water right contracts had been made with a great number of land owners aggregating 537 1-20 miners inches.

Record pp. 271-277.

And that the total number of inches in use was 326 71-100.

Record p. 277.

If it could be presumed that the water rights were acquired in the order in which they are set out in the list of sales given by the secretary the company would have been obligated to furnish 300 inches of water before the complainants would have been entitled to any water. During the summer of 1894 it could not supply more than half that amount if no water had been furnished to the city of San Diego, in the early part of the season.

Trans. p. 270.

And, at the instance of the appellants, it was stipulated that there were other water right contracts executed by the company prior in time to the one in controversy, in one of which, alone, the contract was for 100 inches.

Record pp. 244, 245.

So that there is no allegation, and no proof, whatever, that the complainants, if their alleged doctrine of priority obtains, were entitled to any water from the company. Indeed, if their claim that the company sold water beyond its capacity is maintained they may have been of the later purchasers whose water rights were invalid as against other purchasers of an earlier date. But they have not alleged the invalidity of the contract for that season.

We submit that under their own claim of priority of right they have no defense that would entitle them either to a rescission of the contract or to damages.

IV.

THERE IS NO SHOWING THAT THE DEFENDANT COMPANY HAS IN ANY WAY VIOLATED THE CONTRACT.

It is conclusively shown by the allegations of the appellants answer to the cross complaint, and the evidence, that the company had not oversold its water supply or was delivering or attempting to deliver more water than its system would supply under ordinary and normal conditions. Our statement of the evidence above shows that the capacity of the reservoir and flume of the company was not less than *seven hundred inches.* The proof is, and it is undisputed that the company only sold *five hundred and thirty-seven and one-twentieth inches.*

And that only *three hundred and twenty-six and seventy-hundredths inches* has actually been put to use. If we take their expert testimony as to the capacity of the system it shows it to have been over *five hundred inches.*

But, whatever the sales may have been, there could have been no injury to the complainants unless that water was

actually being supplied to some one else when it should have been furnished to them. And their own answer expressly alleges the capacity of the defendants' system to be *three hundred and seventy-five inches* for 365 days of an *"ordinarily wet year."*

Record p. 68.

Then the capacity of the company's system, of an ordinary year, was admitted by the answer to be 375 inches. The water being delivered by it was only 326 inches, omitting fractions, leaving a margin of 49 inches for the full 365 days of the year.

We cannot conceive of any ground upon which the complainants can defend against their contract under such circumstances.

We have reviewed the evidence, above. It shows that, of an ordinary year, the company could have furnished a full supply of water to all its consumers, and that it had always done so up to that time. Can it be possible that for a failure to do so, on account of an extraordinary drought, the company can be held in damages to every consumer whose water supply fell short, when the company has used every effort, and every precaution, to so distribute and conserve the water as to protect all consumers as fully as possible? We cannot believe any court will so hold. It can make no difference whether the provisions relied on by us relieves it from liability or not. It cannot, as matter of law independently of contract, be held in damages where it has been guilty of no negligence but has done its whole duty to all of its consumers and thus minimized the loss resulting to them for the shortage of water.

And we think we have shown by the review of the evidence above that no violation of the appellants' rights was committed by supplying water to the city of San Diego, through he San

Diego Water Company. It had been doing so for years. It was organized partly for that purpose. The city was dependent upon it for its water supply and suffered severely as the evidence shows when it withdrew the supply.

And, as we have shown, there is no basis, either in the pleadings or the evidence for the claim that the appellants' right to the water was in any way superior, either to the city of San Diego or the San Diego Water Company, or that to supply water to them, or either of them, was a violation of their rights.

The whole trouble and the loss, if any, to the appellants was the result of their own neglect to save and store for use the water needed by them during the summer season. They were entitled to 15 inches of water, continuous flow for three hundred and sixty-five days. The company was not bound, under its contract, to store the water and deliver it all during a few days when they were actually irrigating in summer. The evidence shows that they only irrigated their grapes once or twice a year, and all the balance of the year the water to which they were entitled was allowed to run to waste or past on to some one else.

Record p. 174.

They had the legal right to take their fifteen inches, continuously, or as much of the time as they pleased, and store it for their use when they needed it. They did not do so. It was impossible for the company to do it if it had tried. A great part of the water flowing in the streams during the winter and spring must, necessarily, be lost if not taken out and stored. Most of these streams were below the companies' storage reservoir, but by means of a diverting dam the water was conducted into its flume and carried down, as much as the flume would carry, to the consumers, thus saving the water

in its storage reservoir as long as possible. Other consumers, as the evidence shows, did provide means of storage of this surplus water, but the appellants did not. They suffered loss. It was their own fault in failing to save what was theirs under the contract. This being so they can have no claim against the defendant.

V.

DAMAGES.

If we are right that there was no breach of the contract on the part of the defendant there can of course be no recovery of damages. But if there was a breach of the contract, the amount of damages is greatly exaggerated, we have no doubt. The secret of the whole effort to get rid of this contract, and at the same time recover damages is that the raisin industry is not a paying one. The testimony of Mr. Donald, the foreman of the complainant, fixes the damages at about $6,050.

Record p. 133.

But it is a most singular fact that the complainants, if this story be true, should be trying to get rid of this contract, and deprive themselves altogether of the water. The absurdity of the whole thing appears in the cross examination of the witness. He sticks to his story, manfully, throughout, notwithstanding he is compelled to admit that every year they do without the water they will be damaged, for the want of it, from $5,000 to $6,000. He says:

"Q. Has it been damaged in an equal amount by your the year 1894 by the failure to get your full 30 inches of water?

"A. About $6,500 damage.

"Q. Has it been damaged in an equal amount by your having the same quantity of water only this year?

"Mr. Gibson: Objected to as incompetent, irrelevant and immaterial.

"A. Pretty nearly so.

"Q. You have lost about as much then this year by not having the water as you lost last year?

"A. Very nearly so.

"Q. Then you estimate, Mr. Donald, that by the failure to receive this 15 inches of water the owners of the Boston ranch will be damaged each year from five to six thousand dollars?

"A. So long as they remain out of the water; yes, sir.

"Q. Is there any other source from which there is any probability of getting water in the near future?

"A. I am not competent to answer that question, sir.

"Q. You do not know of any do you?

"A. I do not know of any."

Record p. 134.

In other words, they are so anxious to get rid of this contract that they would rather suffer loss that would in a year and a half, pay the whole amount due upon the water contract than not. The truth is that they have simply made this temporary shortage of water an excuse for breaking their promise to pay for the water right, and at the same time recover damages if they can. No one can read the evidence in the case, we sincerely believe, and not be convinced of this fact.

This witness, who is their chief reliance, on the subject of damages, shows, on his cross examination, that he really knows very little about the actual damage resulting from the want of water. He admitted that he did not know what the fruit sold for that year, or what profit they could have made if they had grown and marketed a full crop.

Record, p. 122.

And he admits that the crop of rasins was generally short that year.

Record p. 129.

There is another significant fact disclosed by his testimony.

He says they were experimenting to see how well they could get along without water.

Record p. 132.

Again, if damage occurred to the appellants, it was, in a large part, if not wholly, by reason of their own fault and negligence. Their contract with the appellee was for a continuous flow. They rad no right to ask or expect water for their use during the short time they needed it for irrigating their grapes. This was a very material matter to the appellee, because, during fully one-half of the year, when the water was furnished continuously, it could furnish it from the running streams, without drawing upon the reservoirs. And in a section of country where the full benefit of the water can only be had by storing it, this is a very important consideration. And in San Diego county this can only be done by providing storage reservoirs, which are exceedingly expensive, because there are no natural streams from which sufficient water san be diverted during the dry season. So it was a question, in this case, whether the appellee or its consumers should provide the storage necessary to get the full benefit of the water. And in the contract with the appellants, as well as with its own consumers, it has only obligated itself to furnish the water by a continuous flow, leaving the consumer to provide for storing it on his own premises when not needed for actual use.

The evidence shows that the water was only used for irrigation of the grapes "once or twice" a year. Their witness, Mr. Sternenberg, who worked on the ranch, testified to the facts as follows:

"Q. How many times during the year would they irrigate the grapes?

"A. They would irrigate them once or twice, try to—do you mean in any particular year?

"Q. No, I mean generally.

"A. From one to twice.

"Q. During the entire year?

"A. Yes, sir.

"Q. You say the water was running constantly from the flume?

"A. During the irrigating time.

"Q. Only during the irrigating time?

"A. Yes, sir.

"Q. And you didn't take any of your water until you actually wanted to irrigate the grapes or the other fruit?

"A. Yes, sir.

"Q. You had no means of storing the water at all on the ranch?

"A. No."

Record p. 174.

This evidence shows three things, viz: that they only needed water, for actual use, for a very short time, and if they had provided means for storing their water that went to waste, when not needed, they could have had the full benefit of it, and that they simply neglected this necessary precaution to avoid loss during a dry season. They now seek to recover their loss, brought about by their own want of care, from the defendant, who was under no obligation to store and save the water for them. The evidence shows that such storage was necessary.

Mr. Harris, their witness, testifies:

"Q. Suppose they only irrigate their grapes, for instance, twice in a year, if their constant flow of 30 inches during the balance of the year was stored in reservoirs on the ranch, it would add immensely to th practical use of the water, would it would add immensely to the practical use of the water, would it not?

A. Yes, sir; if the company would build storage reservoirs.

"Q. I am talking about the owner on his own ranch?

"A. He would be very fortunate in having a place to store it, otherwise he could not use it.

"Q. Is it not the custom of ranchers now generally to supply reservoirs on their ranches to accumulate the water?

"A. It is getting to be the custom of ranchers on the line of the flume.

"Q. Is it not so everywhere where parties buy their water by constant flow, without accumulation?

"A. Yes, sir; where they buy water under those conditions they have to provide storage.

"Q. Is it not absolutely necessary, in order to get the full benefit of their water, where they are only entitled to it by constant flow?

"A. They have either to provide storage or sit up nights and work Sundays.

"Q. And every day in the year?

"A. Every day in the year."

Record, p. 200-201.

And that other consumers, more thoughtful of their interests, did provide their own storage and thus provided for a dry season.

Record, p. 201.

And the lay of appellants' lands was such that they could have provided such reservoir or reservoirs.

Record, p. 477.

Therefore, if there was any damage to the appellants it was their own fault. With the amount of money they claim they have lost, by being deprived of the water, they could have constructed one or more storage reservoirs that would have prevented any loss at all. And yet they prefer to lose $6,000 a year, from this on, rather than protect themselves in that way. This only proves, more clearly, what we claimed before, that this shortage of water is simply made an excuse for getting rid of this contract and at the same time for avoiding the payment of what they owe for the water and the water right.

The claim for damages is as devoid of merit as the demand for a rescission of the contract.

But there is another unanswerable reason why they cannot recover damages in this action. There is no evidence on which to estimate the damages. Their only evidence of the amount of

damages they sustained is by proof of the supposed quantity of fruit they could have grown if they had had the water, what they did grow without it, and the estimate of witnesses as to the price they could have realized for the fruit they did not raise.

Record, p. 112.

The manager of the ranch testifies that the damage complained of amounted to $6,500 and consisted of damage to the orange and lemon trees and crop of $600, to the grape crop $5,400, shade trees and olive trees $500, and the alfalfa $50. It will be seen, therefore, that almost the entire damage attempted to be shown was by reason of the loss of a crop that it is supposed they would have raised and sold if they had got the water.

But such speculative profits, on a crop that might have been raised, is not the proper basis for fixing damages, for the best of reasons.

Crow v. San Joaquin Canal and Ir. Co., 62 Pac. Rep. 562.

In the case cited, the Superior Court of California said:

"The only evidence offered on the part of the plaintiff as to damages, consisted of testimony that, had he obtained the water, he would have planted a crop of alfalfa, from which he would have realized certain profits, but owing to his failure to get the water, he did not plant it. This evidence was admitted over the objections and exceptions of the defendant; and the court instructed the jury that the plaintiff was entitled to recover, as damages, the profits he would have realized from "the crops of alfalfa that he would have raised on the said land had water been furnished by defendant, as demanded by the plaintiff, less the cost of planting, cutting, and caring for such crops, and less what said land actually produced and netted to plaintiff in the years 1896 and 1897." Herein we think the court was clearly in error. The measure of damages arising from a breach of contract or in tort is the detriment proximately caused thereby. . Civ. Code, Sec. 3333. The rule embodied in the instruction of the court, and under which the

testimony on behalf of the plaintiff was admitted, is too remote and speculative. The proper measure of damages in a case like this is the difference between the rental value of the land with water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted. If the land had been actually taken from the plaintiff by the defendant during the period in question, the company would have been liable for its rental value only during the time plaintiff was deprived of it. Conjectural profits of the kind sought here cannot be recovered as damages in such cases. They must be damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action. Muldrow v. Norris, 2 Cal. 74, 78; Giaccomini v. Bulkeley, 51 Cal. 260; City of Chicago v. Huenerbein 85 Ill. 594; Pollitt v. Long, 58 Barb. 20, 35. In City of Chicago v. Huenerbein, supra, the action was for damages in flowing water upon plaintiff's land, thereby preventing him from cultivating it. The trial court permitted the plaintiff to prove that, if the land had been planted with potatoes, the ground would have yielded 200 busheds to the acre; that they would have sold at an average of 70 cents a bushel when matured. On appeal the court say: "The rule for the assessment of damages was wrong. In cases of this character the true measure is the fair rental value of the ground which was overflowed, and not the possible or even the probable profits that might have been made had the land not been overflowed. Such damages are too remote and speculative, depending upon too large a variety of contingencies which might never have happened." In this case one of plaintiff's witnesses, and a farmer of experience, testified that even good farmers, in sowing alfalfa "frequently failed to make a stand," and that had frequently happened to himself. The result of the crop would largely depend upon the amount and character of the care it should receive, the condition of the weather, and a variety of other matters entirely uncertain and contingent. In this case it appears that the plaintiff applied for water on August 31, 1896, and was refused. Afterwards, having settled his back indebtedness, he obtained water in the spring of 1897, having been deprived of the water only about eight months. He testified that he had the land for six years, and that, although he had had water all the time for five of thos years, he had never made anything. In fact, after farming it for four years, he

became insolvent. Yet the jury, under the instructions and testimony referred to, estimated that if he had got the water, on this particular occasion, eight months sooner than he did, he would have made a clear profit of $1,091, which was the amount of their verdict. For the foregoing error on the question of damages, the judgment and order denying a new trial are reversed, and a new trial ordered."

This it seems to us is conclusive against their right to recover damages.

But the court below decided the case in favor of the appellee on the unanswerable ground that there was no breach of the contract to supply water, and therefore there was no basis for either the rescission of the contract or the recovery of damages. The undisputed evidence and the express admission in the answer of the appellants to the cross complaint were to the effect that the failure to supply the water resulted from the extreme drought of the year in question. The contract, as we have seen, provided in express terms that if the corporation's supply of water be at any time shortened, or its capacity for delivering the same impaired by the act of God or by the elements or by drought, or the failure of the average amount of rainfall in the mountains, etc., "the above described land and the land to which said fifteen inches of water or any portion thereof may be attached as hereinbefore provided, shall, during the period of such shortage or impairment, be entitled to only such water as can be supplied to and for it after the full supply shall have been furnished to all cities and towns as or may be dependent, either in whole or in part, upon said system of water works for their supply of water for municipal purposes and for the use of their inhabitants." And the contract contained this further provision:

"*And the said party of the first part shall not be responsible for any deficiency of water occasioned by any of the above causes, but the party of the first part shall use and employ all*

due diligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein.'

This latter provision in thecontract is plain and explicit. The evidence, as we have shown, was clearly to the effect that but for the extreme drought the company wuold have been able to furnish a full supply of water. That it did not do so was because of the very fact mentioned in the contract, and with respect to which it was expressly provided the Company should not be responsible. The evidence shows beyond question that every reasonable effort was made by the company to avoid the unexpected drought. It had never failed before to furnish a full supply of water. It would not have failed that year if there had been an average amount of rainfall. The question is a simple one, and we submit was rightly decided by the court below. This court would hardly undertake, under the circumstances, to review this question of fact passed upon by the learned judge of the court below, and reverse the decision on that ground; and after all, it is the only question on this appeal. Or, in other words, if the court below was right on this proposition, then no matter how the other questions raised by counsel might be decided, the decree would have to be affirmed. This is necessarily so, because if there was no breach of contract, there was no ground for a rescission, and none for damages. We may confidently submit this appeal upon this question alone, which, if rightly decided by the court below, is decisive of the appeal.

We respectfully submit that the complainants have shown no defense to the cross complaint and that the defendant is entitled to recover the full amount agreed by the contract to be paid.

WORKS, LEE & WORKS,
Counsel for Appellee.

No. 814

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

H. SOUTHER and W. S. CROSBY,
Appellants,

vs.

SAN DIEGO FLUME COMPANY,
Appellee

Additional Brief of Appellee.

WORKS & WORKS,
Counsel for Appellee.

Clerk

Filed May 1902

FILED

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C. H. SOUTHER and W. S. CROSBY,
Appellants,

vs.

SAN DIEGO FLUME COMPANY,
Appellee.

Additional Brief of Appellee.

In the brief of the appellant, the point is made that the decree is for too large a sum, in that the decree was rendered for water rentals for the term of one year, when it should have been for six months only, and that a mistake was made in the calculation of interest upon the installments of interest due on the water right contract, growing out of the fact that the interest commenced to run, not from the date of the contract, but from a date named in the contract one month and eighteen days later.

We have gone over these calculations, and are satisfied that a mistake was made in the particulars mentioned, and in view of that mistake, have filed our remittitur of the amount of that sum, amounting to six hundred eighty-five dollars ($685.00), but without costs to the appellant.

It will be evident to the Court that the appeal in this case was not prosecuted on account of this mistake in the amount. The decree was submitted to counsel on the other side several days before it was submitted to the Court and signed. All that would have been necessary in order to correct the decree in this particular would have been to have called the attention of counsel and the Court to this mistake, and it would have been rectified. They cannot prosecute the appeal under such circumstances, and recover their costs, on the ground of this mistake. The application to correct the decree in this particular should have been made to the Court below.

Respectfully submitted,

WORKS & WORKS,
Attorneys for Appellee.

No. 814.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. H. SOUTHER and W. S. CROSBY,
APPELLANTS,

vs.

SAN DIEGO FLUME COMPANY,
APPELLEE.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Pursuant to the leave granted by the Court, the appellants submit a brief reply to such points of appellee's argument as seem to call for notice, not meaning to concede, however, any that are not touched upon.

Rescission Cognizable as Defense to Cross-Bill.

Much of appellee's brief is devoted to an attempt to show, what it is claimed this Court decided on the former appeal, viz., that the appellants' pleadings and proofs showed no ground for the equitatable remedy of cancellation of the contract. Appellee's counsel fail to regard the distinction between this extraordinary remedy in equity for the annulment of a contract, granted at the suit of a plaintiff, and the ordinary remedy, available either in law or equity, by way of defense to a suit on the contract where there has been a failure of consideration, or such a breach by one party as excuses the other from further performance. This distinction was recognized in the former decision of this Court (which counsel entirely misconstrued), and it was expressly declared that the question of rescission of the contract would be cognizable as a defense to the cross-bill in this case. (See Fed. Rep. vol. 90, p. 171). This is the law of the case and settles the question beyond dispute.

Mathews v. Bank, 40 C. C. A. 444;
100 Fed. 393.

The Evidence Establishes Appellants' Defenses to the Contract.

In considering the evidence, and the questions of fact to be determined in this case, it is important to note, that the appellee's cross-bill did not waive an answer under oath, and consequently, all the allegations of the answer thereto, responsive to the cross-bill, are presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborative evidence.

I Foster's Fed. Prac., Sec. 84, p. 173;
Vigel v. Hopp, 104 U. S. 441;
3 Desty's Fed. Pro., p. 1757.

Again, practically all the matters sought to be established by appellants' evidence, except the question of damages, were admitted by the appellee, through its counsel, at the taking of the testimony: see the statement of appellee's counsel, Record, p. 119, as follows:

"That is all admitted, Judge. There is no controversy about that. In fact most all you are proving here is admitted—I believe everything except the question of damages."

So there should be no question but that the weight of the evidence inclines decidedly in favor of appellants.

Appellants' Pleadings Sufficient.

(Appellee's Brief, pages 14-15.) The point, that appellants' pleadings do not show the necessary facts on which to base a right by priorty, is not well taken. It was alleged that appellee had largely over-sold its capacity and, for that reason, had failed to furnish appellants with the water to which their contract entitled them. The breach of the contract by deprivation of the water was the fact of which appellants had knowledge; the exact dates and amounts of appellee's sales of water they did not, and could not be expected to, know, nor, therefore, plead. Nor was it material to their right to rescind the contract, whether the water to which it entitled them was supplied to other consumers of the appellee whose rights were subordinate to the appellants' rights, or whether all the water, which the appellee had the capacity to furnish, had been sold by it prior to its contract with appellants and was delivered to such purchasers, so that appellants got nothing by their contract.

As to priority of right of the San Diego Water Company: Counsel must have overlooked the allegations of the answer on this head. It is clearly stated (Record, pp. 69-70) that the contract and right of the appellants was prior to the sales of water to that corporation; and it is shown in appellants' open-

ing brief (pp. 51-2) that the proofs sustained these allegations.

In considering the allegations of the cross-bill and the answer thereto, as well as the evidence in the case, it would, it seems to us, be fair to regard the original bill and answer, at least as far as ascertaining the theory of the case, especially in view of the stipulation of the parties, regarding the effect of the evidence and pleadings in the respective causes. (Record, p. 104.)

Counsel note (brief, p. 13) that there was no prayer for rescission or for damages in the answer to the cross-bill. There was no necessity for it; both forms of relief had been prayed for in the original bill, and this Court, as a court of equity, will not refuse the complainants relief to which they are entitled, for want of a repetition of that prayer in the answer, or for want of any prayer.

Evidence Establishes Appellants' Defenses to the Cross-Bill.

The description, which counsel give of the Flume Company's water system differs widely, as it seems to us, from anything shown by the evidence. What the evidence really establishes in this regard we tried to and think did show in our first opening brief (pp. 55-6.)

Page 16): Mr. Doolittle was somewhat in error as to the absolute and relative amount of rainfall in the season of 1893. The Company's own record for that season (Record, p. 462) showed 15.05 inches; and for the season of 1887-8 only 22 inches. (Record, p. 459.)

Counsel say that this was the only occasion, before or since, that the Company failed to furnish the full amount of water demanded of it. This statement will bear explanation. The Company had sold considerable more water than was actually called for and used by its consumers, and more than it could supply, if all sold were called for. The demand for actual water sold, was steadily increasing, but prior to this time had

not overtaken the actual supply, and this will explain why there had been no shortage prior to that year. There is nothing in the record showing the condition subsequent to 1893-4, except for the one season immediately following. As to subsequent dry seasons see statements of appellee's brief, page 43.

(Page 16): The fact that prior to 1893-4 appellee had furnished all the water demanded of it is no proof of its capacity to supply all it had obligated itself to furnish, which was many times the amount demanded. (Appellants' opening brief, pp. 55-58.) What has happened since is not shown in the record, and is immaterial, as is also the evidence as to appellee's contemplated enlargement of its system.

Of what avail is the future construction of reservoirs, to a consumer whose contract is unfulfilled by the appellee company, and whose crops have been lost, because of appellee's failure to provide reservoirs before? What advantage is there in the appellee's filing on water courses, which supply no water?

(Page 18:) The question is not whether appellee was able to furnish the water actually *demanded.* If appellee had more than sold its capacity before (or for that matter after) the contract with appellants was made, this of itself on discovery, gave appellants the right to rescind. And if, as we contend, appellee's failure to supply appellants with water was due to its supplying it to others having only a subordinate right thereto, it is immaterial what the appellee's capacity or the demand upon it may have been.

The statement that the natural flow of streams tributary to appellants' system was sufficient to supply the demands for water except during the irrigating season, if true as to years preceding 1894, was not true in that year, and the increasing demand for water rendered it unlikely that it would be true in subsequent years.

(Page 21): Had the appellee company fulfilled even the obligation which counsel concede, in making additions to its system and keeping pace with the actual demands of its consumers, appellants would have received the full amount of water to which they were entitled. The contract itself provided: "The party of the first part shall use and employ all due diligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein." (Rec. p. 33.)

But this provision the company ignored. Appellee is not entitled to demand $120.00 an inch from the appellants, especially not for water which it does not furnish. Nor is the adjudication of the Board of Supervisors any evidence against these appellants of the amount which appellee has expended upon its system; nor do we perceive the relevancy of such evidence in this case in any view of it. As to what is the best policy for the company we do not presume to know; but we would suggest that a policy, which would enable it to comply with its contracts (which, from the statements of its own officers and its own evidence in this case, would have been entirely practicable), thereby avoiding the liability for damages, might be better from the stand-point of economy, than the "penny wise pound foolish" one, which it has followed.

(Page 22): We regret that appellee seems still inclined to repudiate its obligations under the Indian Reservation contract, by which defendant acquired valuable and essential privileges, riparian rights and right of way for its works. The amount heretofore supplied under that contract is, of course, not the measure of appellee's obligation thereunder.

Appellee's Sale of Water to San Diego Water Co. Not Warranted by the Contract.

(Pages 22-25). In support of the claim that the Flume Company was in fact supplying the City of San Diego and not, as we have contended, the San Diego Water Company, counsel suggest that the arrangement between the companies saved the city the expense of another distributing system, i. e., we suppose, the distributing system which the appellee would have had to install in order to supply the city direct, instead of through the San Diego Water Co. But the fact is that it was the Water Co., not the Flume Co., that supplied the city (and, presumably, paid for the distributing system used), and the Flume Co. was merely one source from which the Water Co. could derive its supply of water. It had its own plant and appliances for pumping and diverting water from the San Diego River, and there were probably other sources of supply to which it could and would have resorted if the Flume Co. had not sold it water. (Rec., pp. 239–40). And the record shows that the arrangement between the two corporations, under which the water was actually being supplied in the year 1894. and previously, was one which the parties treated as terminable upon notice, at any time. (Rec., pp. 355, 270). It was not being furnished under the alleged contract between the two companies, introduced in evidence. (Rec., p. 313). And the evanescent character of the arrangement between the two corporations is well illustrated by the testimony of the secretary of the appellee company (Rec., p. 261): "We have had so many changes from water company to flume company, and pumping and all that sort of thing, that I don't know where we were the year before." How can it be contended that such transactions between these two corporations could justify the Flume Co. in disregarding its binding contracts to supply irrigators with a con-

tinuous and perpetual flow of water, failing in which their farms would be ruined, in order to sell the water at a higher price to the other water corporation, which in turn sold it for irrigating as well as domestic uses? (Rec., pp. 361–4).

The suggestion that appellants were the only consumers of the appellee who found fault with the failure of the company to comply with its contracts in the season of 1894 is hardly worth noticing. For the real (and contrary) facts in the case, see the statement in the letter of the appellee's vice-president (Rec., p. 314).

Counsel refer to the suffering, which they say resulted from the appellee's cutting off its supply of water to the San Diego Water Company. We think a careful reading of the testimony of appellee's witness, Flint, (Record, pp. 355–8), in connection with the order which he obtained from the Circuit Court (Record, pp. 359-60), and the testimony of witness Barber, (Record, pp. 241-3) will show that the "suffering" in question was simply from the want of water for the sprinkling of lawns and ornamental gardens, and the like uses. The provision of the contract referred to by counsel surely can not be invoked to justify the withdrawal from the country consumers of water purchased under prior contracts, become appurtenant to their lands, and absolutely essential to the preservation of their crops, trees and vines, planted in faith of its continuance, in order to supply the water under a subsequent contract to another corporation for the uses of city residents mentioned above. The superiority of the country irrigators' claims was recognized in the order of court above referred to. Certainly this clause of the contract does not contemplate or sanction the supplying of water for irrigation to the consumers in or near the city, as was done by the appellee through the San Diego Water Company in this case.

No Ground Shown for Denying Rescission of the Contract.

(Pages 25–42). The greater part of the argument on these pages, directed as it is against the right of appellants to the equitable relief of cancellation of the contract, is irrelevant to the case as it now stands, as above pointed out, and requires no further reply. The fact, if it was a fact, that the appellants had an adequate remedy by mandamus, can not deprive them of their right to the relief now sought. But mandamus does not lie to compel the performance of a contractual obligation, (however it might be as to purely a public duty).

California Code Civ. Prac., Sec. 1085;

II Spelling on Extraordinary Rel., Sec. 1379;

High on Extraordinary Rem., Sec. 25.

Hence, even if appellants could have compelled the appellee to supply them with water, under the authority cited by appellee, this would not have been by virtue of the contract but by reason of the duty of the appellee company as a quasi public corporation; and the writ would not have been granted unless the appellee had water which it could legally supply to the appellants; and if it had such water, its failure to supply it was a breach of the contract clearly giving appellants the right to rescind. Certainly it is not for the appellee, after having violated both its duty under the contract, and its public duty as a water corporation, to say that because the appellants did not attempt to compel its performance of the public duty, which it was unable to perform, they can not have relief for its breach of the contractual duty. And inasmuch as the appellants, if they had obtained a supply of water from the appellee by mandamus, would doubtless have been compelled to pay therefor at the rate fixed by the public authorities, viz.: $120.00 per inch, and not at the contract rate of $60.00 per inch, there

is no ground for the assertion of counsel that their failure to pursue this remedy shows that the appellants were not seeking their rights under the contract, but merely trying to evade the payment of the agreed price for the water-right.

It is contended that appellee's failure to comply with the contract was only partial and temporary. And that appellee merely failed to deliver a part of the water contracted for, which shows no intention on its part to abandon the contract and that the breach could be fully compensated for in damages.

In the first place, there was not a partial or temporary failure to furnish the water, but, on the contrary, there was a complete failure to furnish the fifteen inches of water under the contract rescinded, and the evidence shows that the failure was permanent, for the reason that the appellee is unable to supply all the water that it has previously obligated itself to furnish. The rescission is based upon the fact that all of the fifteen inches of water required by the rescinded contract of March 12th, 1890, failed and was not furnished after June 9th, 1894, and it is so alleged in the answer to the Cross-bill.

Travelers' Insurance Co. vs. Redfield, 4 Pac. Rep. 194, cited to support the contention that the breach of contract was only partial, and temporary, and that, as it could be fully compensated for in damages, a Court of Chancery will not cancel the contract, has no application here for the reason that there was not a partial or temporary failure of the water, and it does not sustain the contention of the appellee here that appellants could be fully compensated in damages for the deprivation of the water. In that case it appears that the plaintiff Redfield and another made a promissory note to one Henry, in payment for water rights, for $6,400.00, due five years from date, with interest of 10 per cent. per annum, and secured it by a deed of trust upon certain land owned by them. The

interest of Warner in the land was subsequently acquired by Redfield, who assumed the payment of the note and trust deed. The sole consideration of the note was a title to eight water rights to be secured to the makers by the Irrigation Company and the Insurance Company, the water to be taken from the canals of the Irrigation Co. and used in the irrigating of Redfield's land. The Irrigation Co. contracted a bonded indebtedness, secured by a deed of trust upon all of its property, executed to one Davis, Vice-President of the Insurance Company, as Trustee, which latter Company was the owner of all the bonds so secured.

The plaintiff under the transfer from the Company, had the undisturbed use of the water rights for seven years, but at the time of the transfer the Company was in the hands of a trustee, and this trustee having failed to complete the conveyance of the water rights, by executing a release therefor, to the plaintiff the latter sought to cancel the note and the trust deed securing the same. It was held that the defendant trustee, having in his answer tendered a sufficient deed to the water rights plaintiff was bound to accept it, and there could be no cancellation of the note, there being no ground of fraud or of the failure or inability of the Company to furnish the water, or irreparable injury by being deprived of the water, and the complete title might be secured by the acceptance of the deed tendered.

This is a very different case from the one in hand, for the reason that no conveyance or instrument was necessary to be executed or passed, but the consideration for the instrument that had been executed, viz: the contract of March 12th, 1890, wholly failed, and the appellants by being deprived thereof suffered great and irreparable injury. This we submit presents a very strong and urgent case for the relief sought in this action.

The other case cited to the same point, *Kimball vs. West,* 15 Wall. 377, is one where the plaintiffs brought their bill in Chancery to rescind a contract for the executed sale of land. The deed contained a clause of *general warranty.* The title to a part of the land conveyed was defective, but before the case came to a final hearing the defendant purchased the outstanding and conflicting title to the portion of the land, and tendered to plaintiffs such conveyances as made their title perfect. The Circuit Court dismissed the bill of plaintiffs, and this was sustained by the Supreme Court on the ground that for any defect in their title the law gave them a remedy by an action on the covenant in the deed, and as it appeared at the time of the hearing that the defendant was able to remedy the supposed defect of the title in point of fact and had remedied the defect at his own cost, the plaintiffs must show some *loss, injury or damage by delay,* in perfecting the title, before they could claim a rescission of the contract; and even if this could be shown, which was attempted in the case, it was held that the Court as a general rule would not be authorized to decree a rescission if compensation could be made for the injury arising from the delay in making good the original defect in the title, because a remedy existed on the covenant.

This certainly differs widely from the case at bar, in which there was not merely a failure of title to the water, but the failure of the water or property itself, for the loss of which and the injury resulting therefrom, appellants could not be adequately compensated in damages.

All the other cases except *Burge vs. Cedar Rapids etc. R. R. Co.,* 10 Ia. 101, are to the effect that where a contract is severable, and only partly performed and an action is brought thereon, the plaintiff may recover for the part performed, and the defendant may have his damages for the breach deducted from the amount so recovered by the plaintiff, for the reason

that the breach would give the defendant a right to sue.

But even if this doctrine applied to the character of property, the subject of the complaint in question here, which we do not admit, still the contract is not severable, because the money consideration was to be paid on one side and the water delivered on the other side in their entirety, and as the water was to be delivered continuously, it was an executory contract.

See *Gomer vs. McPhee,* 31 P. Rep. 119.

The other case, *Burge vs. Cedar Rapids, etc. R. R. Co.* simply holds that where rescission is sought of a partly performed contract, the party seeking the rescission cannot effect it without restoring or offering to restore the consideration received, and the parties can be placed in *statu quo.*

Defendant's counsel say that appellants were deprived of their water for only four months. By this they mean to be understood as saying from the time that the water was cut off in June until the notice of rescission was given. As a matter of fact, the water was not tendered, notwithstanding the repeated demands for it prior to rescission until about the middle of December of the same year, a period of six months, during which time appellee confesses that it was unable to supply water to the appellants under their contract of March 12th, 1890. Besides appellee had control of the water gate connecting with appellants' pipe and did not open it and turn in this water it now says it was so anxious to deliver.

But whether the period of deprivation was four or six months is not material, when it is remembered that the first four months of the deprivation was during the irrigating season, when the use of the water for irrigation of the lands of appellants was indispensably necessary for the growth and preservation of their trees, vines and alfalfa, and also production of their orchards and vineyard.

If the deprivation of irrigation water during an entire irri-

gating season is trivial and of no consequence in Southern California, where so much depends upon the use of water for irrigation, the sooner it is discovered by irrigators the better.

It is common knowledge, and is established by the evidence in this case that trees and vines, dependent upon irrigation cannot be deprived of irrigation during a whole, or even a portion, of the irrigation season in Southern California, without great damage.

And it is idle talk to say, that one can be fully compensated in damages for the destruction or injury to the growth of irrigated producing trees and vines such as it is admitted were upon complainants' land.

Bearing fruit trees and vines that are destroyed may, it is true, be replaced by new young trees and vines, but the years of difference in growth, and fruit production, can never be made up. Nor can trees or vines once stunted or checked in growth for want of water during an entire irrigation season, with the most generous treatment overcome for a number of years afterward, if at all, the check on their growth and production capacity, caused by such deprivation of water.

Of these facts the Court will take notice, as they fall within the laws of nature, of which the Courts take judicial notice.

Cal. C. C. P. Sec. 1875, *subd.* 8.

Brown vs. Anderson, 77 Cal. 236.

1 *Rice on Ev., p.* 20, *subd. b.*

Finally, it is a most inequitable construction of this provision which would make it a warrant for the conduct of the appellee here, in undertaking to furnish a city with water to the detriment of country consumers whom it had previously bound itself to supply. Such a construction would work great injustice to the country consumers, as it has to the appellants in this case.

The appellee entered into two several contracts to supply

appellants with water, and then subsequently entered into an arrangement with the San Diego Water Company to supply it with water for a higher compensation per inch than it was receiving from the appellants; and its cupidity led it to commit the injustice of exhausting its water supply by furnishing the city with water, because it obtained a higher compensation from it than it could have obtained and did receive from the appellants under the contracts; and then to excuse this they say that the clause in the contract provides that they may practice such constructive fraud and injustice.

If such a clause in a contract can be given the construction that appellee contends for, then it may seek to and supply every city and town in the county that it may reach with water, and thus exhaust every drop of its water in supplying such cities and towns; and thereby entirely ignore the prior consumers in the country, and deprive them of water for domestic use and for irrigation. For if it may do it in the case of a single city or town, and to the extent of a single inch of water, it may do it as to all the cities and towns that it can reach, and to the whole extent of its capacity to supply water, because there is no limit in the clause in the contract, under which it seeks to justify such high handed conduct. That there are other water contracts of defendant's without this clause, (Rec. p. 145) shows that it discriminates in certain cases, between its consumers.

It is true that there was a shortage of water in the City of San Diego, owing largely to the fact that the water works of the San Diego Water Company in the San Diego River had been allowed to remain idle for a long time, and partly to the fact that the water in the wells in the River was low. (Trans. pp. 346-350.)

But it seems from the testimony of Mr. Flint, Superintend-

ent of the San Diego Water Company, (See above references), that his Company managed to supply the City with all the water it needed for *domestic use,* as well as for the irrigation of lawns and shrubbery sufficient to keep them alive, except that it was shortened at times in certain portions of the City. (Trans. pp. 310-311.)

It may be pertinently asked here if the construction appellee's counsel would now put upon the clause of the contract in question is correct, why is it that if the City was threatened with a water famine the appellee entirely cut off its supply from the City, as it did on July 21st.

See the views of appellee's Board of Directors on this point, as set forth in the Vice-President's letter to the President, dated June 22nd, 1894, (Trans. pp. 308-9), where it is said:

"If they are shut off (meaning the San Diego Water Company), and find they *actually* cannot supply more than half the City's requirements, and either take measures to force us to give them water under the theory that the City is entitled to first call, or make a strong appeal for help, the Flume Company will be in a better position with its country consumers, if it then responds partially, at least, to a demonstrated necessity."

If appellee felt sure of its position, why was it necessary to devise ways and means to work upon the sympathies of the country consumers and induce them to acquiesce in the appellee's sharing its water supply with the San Diego Water Company to relieve the contemplated distress of the inhabitants of the City?

The whole letter from which the above extract is made, as well as the subsequent letter, (Trans. p.310), indicates very strongly that the construction now sought by counsel to be placed upon the clause of the contract, is one in which the appellee had but little confidence.

It is claimed that appellants did not act promptly in rescind-

ing, because they waited some four months (in the meantime demanding, and endeavoring to secure, the water) before they gave notice of rescission. If they had attempted to rescind any sooner, appellee would now be claiming that their action was premature, and that they should have waited (as they did) a reasonable time to see if the appellee would not yet supply them with water in time to save their orchards and vineyard. (See opening br. p. 67.) Appellee was not injured by the delay, and all the water which it supplied to the appellants they were entitled to under their prior contract; and there was no false pretense on their part, nor any wrong to other consumers, in their receiving all of it from the appellee.

(Pages 36-8.) The appellee's counsel claim that appellants did not offer to restore what they received under the contract, viz: the conveyance of a water right to 15 inches of water. This is a mistake. See notice of rescission, Trans. p. 40. The conduct of appellee in refusing to consent to the rescission, shows that any more formal tender of a conveyance would have been likewise rejected; hence, none was necessary.

Dowd v. Clark, 54 *Cal.* 48.

Sheplar v. Green, 96 *Cal.* 218.

Bucklin v. Hasterlip, 40 *N. E.* 564.

And besides the rescission of the contract operated as a complete release and extinguishment by it.

Civil Code, Sec. 1688.

Bradley vs. Gas Control Co., 102 *Cal.* 632.

And cases in Opening Br.

Furthermore, the appellee has been fully compensated for all the water which it supplied under the contract prior to the rescission; the sum of $2250.00 paid by the appellants as water

rentals fully paid for the water at the contract rate up to May 1st, 1894, and there is nothing in the evidence to show that it was not ample compensation for all the water received by appellants under the contract, including that supplied after May 1st, and up to June 9th; but if the Court should consider that the appellee is entitled to additional compensation for that period, it can be deducted from the $2160.00 paid by appellants to appellee, as interest, no part of which is now sought to be recovered by appellants, and if only one-half of the water to that date was received then, as we claim it was all received under the appellants' prior contract, then appellee has not shown that all the water was not paid for under the prior contract.

(Page 37.) It is contended that the appellants had no right to elect to take all of the water under one contract and none under the other, or first contract, on the theory that the latter was being fully performed. The answer is that as the contracts were separate and distinct from each other, and one prior in time to the other, appellants certainly had a stronger right to assume the position that they did, that is, that they were deprived of all the water under the second contract and not under the first, than the appellee had, or could have to apportion such amount of water as it might see fit, under the two separate and different contracts, as originally held by appellants.

(Pages 38-42.) We do not think the question of appellants' right to rescind, under our view of the facts in the case, calls for further discussion; and we submit that appellee has in no way overcome the effect of the authorities which we have cited. Its counsel overlook the oversale of its capacity as an element in appellants' grounds for rescission.

Appellants' Right by Priority Established.

Appellee's counsel accuse us of treating lightly the subject of right by priority. We certainly did not intend to do so; and we do not think we did.

We submit that counsel for appellee have pointed out no ways in which this Court can escape from the logic of the Statutes, and the decisions of this and other Courts, which establish a priority of right as between consumers actually receiving water from the same system of supply. Neither have they shown any rational ground for distinguishing between the priority of different consumers from the same Water Company, and that of different appropriators from the same water source; nor any reason why in one case the prior claimant should, and in the other case should not, take all the water to the full extent of his right to the exclusion of subsequent claimants. The enforcement of the rule of priority is as just and equitable in one case as in the other.

As to the case of Pallett v. Murphy, cited by us, and discussed in appellee's brief (p. 46), we are not advised what course was taken by the lower court, other than what appears in the report of the case on appeal (63 Pac. Rep., p. 366 et seq.); and we submit that we have given a fair statement of the substance and effect of that decision.

(Pages 48-56): Appellee's counsel advance the theory that the water appropriated and sold by a water company is to be regarded as taken under a single appropriation in which the several purchasers of the water became proportionate sharers. So far as the rights of the appellants here are concerned, a conclusive answer to this proposition is that their contract conveyed to them an absolute right to a specific quantity of water, and not to any proportionate share of the appellee's appropriation or supply. In support of their theory, counsel cite and quote at length the opinion of Chief Justice Helm in

Farmers' High Line Canal & Reservoir Co. vs. Southworth, 21 Pac. 1028.

In that case it was alleged that complainant was, and for many years had been, a consumer of water from defendant's canal; that the defendant Canal Company threatened to compel plaintiff to pro-rate his water with other consumers from the same canal, pursuant to the statute of Colorado providing for such pro-rating in times of scarcity; and that the plaintiff's rights were prior and superior to the rights of such other consumers. Three opinions are reported in the case; one, of Justice Hayt, holds the demurrer to the complaint properly sustained, because the mere allegation of prior right to water, without showing the facts upon which it is based, is but a conclusion of law; he also held, however, that "under some circumstances different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water; that the appropriations do not necessarily relate to the same time."

The second opinion, that of Justice Elliott, concurs with that of Justice Hyat and discusses the questions involved more at length. Referring to prior decisions of the same Court, he says (page 1031):

"From these opinions, the conclusion seems inevitable that the 'better right' acquired by priority of appropriation, is applicable to individual consumers as between themselves when they receive the water through the agency of an artificial stream as well as when they receive the same direct from the natural stream. Also, that if the pro-rating of the water actually received into an irrigating ditch in time of scarcity between all the consumers can be effected by legislative enactment, then the superiority of right acquired by priority of appropriation is without protection or security; and houses and

other permanent improvements of prior appropriators may be rendered comparatively valueless."

The third opinion in the case, that of Chief Justice Helm, from which defendant quotes, while concurring in the judgment of the other Justices as sustaining the demurrer to the complaint, appears to be in disagreement with them on the point to which counsel cite it; i. e., the question of priority between different consumers; it is, therefore, not only "dictum," but the dictum of a dissenting opinion, and is not entitled to any weight as authority.

As to the case of *Wyatt vs. Larimer & Weld Irrigation Co.*, it is sufficient to say that the rights of the parties there were controlled by special provision of their contracts for pro-rating within certain limits; and also that the decision of the Court of Appeals in that case, which defendant cites, was reversed by the Supreme Court of the State, in

Wyatt vs. Larimer & Weld Irrigation Co., 33 Pac. 144.

With reference to these cases cited from the Colorado courts, it should be further observed that they were decided under constitutional provisions differing widely from those of California, and hence are not authority here and cannot overcome in any degree the effect of our statutes and the decisions of our courts thereunder, heretofore cited.

(Pages 56-7): Appellee's counsel seem to assume that we contend the water company should be limited in its sales to its capacity in a year of drought. On the contrary, our contention was for an "ordinary" year as distinguished from an "average" year, and this defendant apparently concedes to be correct.

Counsel for appellee are greatly exercised over the ruin, which they suppose would be entailed upon water companies, by maintaining their liability to consumers in such cases as the present. It is their own fault to make contracts which they

cannot fulfill and it cannot be true that the anticipated ruin of the company should excite more commiseration than the actual ruin of the consumer, which necessarily results from this very policy of excessive sales of water, for which there is no excuse on the part of the company, and no reason but the greed of gain. It was to protect irrigators from just this danger that the statute (Civil Code, sec. 552) was enacted; and the courts, in construing and enforcing it, have rightly perceived that it's true intention and effect is to give to the several irrigators of lands under one water system, rights by priority in the order of time of their taking of the water. As to the statutes making the company liable in damages for failing to supply to a consumer, in a year of light rain-fall, all he had been supplied in a year of greater precipitation, the answer is simply: the statutory duty is predicated upon actual ability of the company to supply, and it is not liable under the statute for failing to supply what it has not.

(Pages 58-9): The contention that appellants' allegations show no right under the law of priority has been answered. We do not understand how counsel conclude that appellants' right by priority is not made out by the evidence. The amount of water actually demanded of appellee in the season of 1894, under contracts prior to appellants, was much less than the amount which appellee actually supplied during that season; and hence the full amount required under appellants' contract might and should have beenfurnished to them by appellee without infringing upon any prior rights; instead of which, appellee supplied the water to which appellants were entitled to others having inferior claims thereto. (See opening brief, pp. 50-52.) In asserting in this connection that appellants have not alleged the invalidity of their contract on the ground of prior sales to and beyond the capacity of appellee, counsel overlook the allegations of paragraph 12 of appellants' answer

to the cross-bill (Record, pages 68-70); we insist that this pleading is broad enough to support both contentions of appellants; that the contract was without consideration from the beginning, because of prior sales by appellee to and far beyond the limit of its capacity, and, also, that if it had been valid in its inception, it would have become voidable because of its failure to supply the water therein stipulated for; and that on both these grounds appellants are entitled to a rescission of the contract and to damages.

Capacity of Appellee's System.

(Pages 59-60): The averment in the answer, to which counsel refer (see Record, page 68), as to the capacity of appellee's system, was not an admission that such capacity was as large as the amount which it was alleged not to exceed, for there was no allegation in that regard in the cross-bill itself; besides, the allegation was made upon such information only as the appellants had when the answer was filed, and they certainly ought not to be held bound by this allegation upon a matter so peculiarly within the knowledge of appellee, and not within their own. But, if that step is necessary, we would certainly ask leave to amend the answer to conform to the proofs. (See National Waterworks Co. v. Kansas City, 62 Fed., page 863.) What the proofs actually established has been shown (opening brief, pp. 55-57).

Counsel for appellee fail to distinguish between the theoretical capacity and duty of the flume and reservoir, and their actual duty and capacity.

In Duty to Store Water.

Pages 61-2): The claim that appellants should have provided storage for their water and that their damage resulted from their failure to do so, we have answered. (Opening

brief, pp. 70-71.) There is, it may be added, nothing in the contract, or in the law, requiring such storage by the consumer. Counsel understand the evidence as to the time consumed in irrigating complainants' lands. With the full flow of water to which their contract entitled them, only a small portion of the vineyards and orchards could be irrigated at one time; consequently, they require a continuous flow during practically the whole irrigating season. (Record, p. 119.)

On the rule as to measure of damages, defendant cites

Crow v. San Joaquin, etc. Co., 62 Pac. 562,

which, it is claimed, holds that the measure of damages for deprivation of water is the difference between the rental value of the land with, and without, water, less the cost of the water. But that was a case where it was attempted to recover possible profits of a crop which it was alleged would have been planted if the water had been supplied, but which, the water being refused, was not planted at all. And it was shown in defense that the crop intended to be planted was one which often produced no profits at all. The Supreme Court properly ruled that profits in such a case were too remote and speculative to furnish a basis of recovery. The distinction between that case and this is obvious. Here the lands have been planted with trees and vines which have come into bearing, and the direct pecuniary loss resulting from a deprivation of water necessary for their irrigation is, in such a case, a matter which can be determined with reasonable certainty. The evidence of the complainants in this case on the question of damages was the estimate of the manager of their ranch as to how much the various trees and crops upon the ranch were damaged by the loss of water. This evidence was admitted without objection, either to its substance or form, and was repeated on cross-examination, and it is too late now for defendant to take any exception to its sufficiency. The witness stated positively

and directly that the several crops and trees were damaged in certain specific sums, and this statement stands in the record uncontradicted, and it cannot now be challenged by defendant. Moreover, that the proper criterion of damage in a case where some crops are actually planted and produced notwithstanding the deprivation of water, is the actual damage to such crops and to trees and the like growing upon the premises, and not the difference in rental value, was decided by the Supreme Court of Colorado, in

No. Colo. I. Co. v. Richards, 22 Col. 450; 45 P. 423,

which shows the distinction between a case where crops have been planted, and where there has been no attempt to cultivate. It is submitted, therefore, that complainants' evidence on the question of damages was competent and sufficient.

Offer of Appellee to Remit Part of Amount in Decree.

Since the foregoing was put into print, we have received a copy of appellee's offer to remit $685.00, which appellee admits is more than was shown to be due. This offer we acknowledged service of, without waiving any rights of appellants on this appeal, or to costs.

At the same time we were served with a copy of additional brief of appellee, which relates solely to this offer to remit. Appellee, after admitting the errors pointed out in appellants' opening brief, and referring to its offer to remit, says, it will be evident that the appeal was not prosecuted on account of this mistake, and that a copy of the decree was submitted to appellants' counsel several days before it was signed, etc.

Now, while the first statement is controverted by the record, and the second is as to matter de hors the record, we admit having received a copy of it a day or two before it was

submitted for signature, for the purpose of examining the form of the decree as to lien and sale; and it was stated we had no objection to the form of the decree. But no examination as to the findings of fact including the amounts found to be due, was made until an appeal was decided on, and steps taken to perfect it, which was some time after the decree had been entered.

So, while all this matter being outside of the record, makes it immaterial, yet we think it removes the impression sought to be created by counsel for appellee as to our knowledge of the correctness of the findings, before we were called upon to examine and test them.

Appellee's counsel were charged with the duty of preparing the decree, which appellants resisted to the last, and in its zeal in computing interest on interest outside of the contract, but within the law, and stretching the recovery to the utmost, included interest and water rental not justified by the pleadings or evidence which it now confesses as error; but forsooth say appellants still ought to be mulct in the cost.

This error is not a mere clerical one; (See Hicklin v. Marco, et al. 64 Fed. Rep. 609) but is one that is vital and substantial, going to the question of whether the findings of fact attacked, are justified by the evidence, and one upon which this appeal is based. It is not a question, therefore, that could be corrected on a mere suggestion in the court below, after the decree had been entered; but one that requires, as we pointed out in our opening brief, p. 69, an examination of the evidence, and which it is proper to correct on this appeal, the same as any other finding attacked.

And moreover this is an error that appellants' counsel was even not persuaded of at the time of the oral argument on May 7, 1902, eleven days after our brief had been served.

And as was shown at the argument the appellants here have already paid large costs, on the other appeal and lost much time owing to the decision in Lanning v. Osborne, and without their fault, in order to have this case determined on the merits; and we respectfully submit that in any aspect of the case appellant should not be charged with further costs, unless this court is constrained to that end.

Conclusion.

There are other points in appellee's brief which we will not attempt to reply to specifically, as we submit that they are fully and completely answered in appellants' opening brief; and that the appellee in its brief has signally failed to show that the appellants were not justified in rescinding the contract and standing upon such recission, and likewise failed to show by the evidence that the exception in the contract relied upon by the appellee excused it for the non-performance, and violation, of its contract with the appellants, of March 12, 1890.

Wherefore, appellants respectfully submit, that the rescission of the contract made by them should be upheld by this Court by its decree; and that whether this Court shall see fit to award any damages or not, still the evidence is ample to justify it in holding that a sufficient and complete defense is shown by the appellants to the cross-bill of the appellee, and the appellants are at least entitled to a decree denying the appellee any relief upon its cross-bill; and, on the other hand, if from any possible phase of the case on the evidence, which we cannot discern, this Court should hold that the rescission was not effected, then the evidence surely establishes such a breach of the contract as to entitle the appellants to a decree for damages and costs, as an offset to whatever appellee may be awarded. But we respectfully submit, that the pleadings and the evidence,

fairly construed, even without the answer to the cross-bill as evidence, or the admission of cross complainant, above noted show that the appellants are entitled to a decree rescinding the contract, and for damages, and for costs.

Respectfully submitted,

BICKNELL, GIBSON & TRASK,
Solicitors and Attorneys for Appellants.

No. 818

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ISSOLA RORICK,

Plaintiff in Error,

vs.

THE RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (A CORPORATION),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Southern District of California.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit in and for the Southern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Issola Rorick, plaintiff, and the Railway Officials' and Employes' Accident Association, a corporation, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Issola Rorick, as by her complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 14th day of April next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 17th day of March, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

The above writ of error is hereby allowed.

OLIN WELLBORN,

Judge.

I hereby certify that a copy of the within writ of error was on the 17th day of March, 1902, lodged in the clerk's office of the said United States Circuit Court for the Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,

Clerk United States Circuit Court, Southern District of California.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Issola Rorick, Plaintiff in Error, vs. Railway Officials' and Employes' Accident Association (a Corporation), Defendant in Error. Writ of Error. Filed March 17, 1902. Wm. M. Van Dyke, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

To the Railway Officials' and Employes' Accident Association, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 14th day of April, A. D. 1902, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, in that certain action number 987, wherein Issola Rorick is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Issola Rorick in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Southern District of California, this 17th day of March, A. D. 1902, and of the Independence of the United States, the one hundred and twenty-sixth.

OLIN WELLBORN,
United States District Judge for the Southern District of California.

[Endorsed]: No. 987. In the United States Circuit Court of Appeals for the Ninth Circuit. Issola Rorick, Plaintiff in Error, vs. Railway Officials' and Employes' Accident Association (a Corporation), defendant in Error. Citation. Filed March 25, 1902. Wm. M. Van Dyke, Clerk, By J. J. Owen, Deputy. Service by copy acknowledged this twenty-fourth day of March, 1902. Otis & Gregg, Attorneys for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Circuit Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[Seal] WM. M. VAN DYKE,
Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Southern Division, of the Southern District of California.

ISSOLA RORICK,

Plaintiff,

vs.

RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),

Defendant.

Second Amended Complaint.

Comes now the plaintiff above-named, with leave of Court first had and obtanied, and files this, her second amended complaint; and for cause of action against defendant complains and alleges:

(I.)

That the said defendant was, and at all the times mentioned herein has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and doing business in the State of California, and is a corporation resident of the State of Indiana, and a nonresident of the State of California; and then and there engaged in the business of accident and life insurance:

(II.)

That heretofore on, to wit, the 26th day of December, A. D. 1899, David G. Rorick executed and delivered unto

defendant his certain application in writing which defendant has at all times since possessed, wherein and whereby he then requested defendant to issue unto him its certain policy of insurance and pursuant to such application and request the said defendant did on, to wit, the day and year last aforesaid, at San Jacinto in the county of Riverside, State of California, for a valuable consideration by said David G. Rorick then and there paid to it, and in consideration of said application executed and delivered said David G. Rorick its certain policy of insurance, of which said application was made a part, which policy was in the words and figures following:

"No. 169,722. Principal sum, $5,000.
Weekly indemnity, $25.00.

RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION.

Indianapolis, Indiana.

In consideration of his written application, which is hereby made a part hereof, and the agreement to fully perform and abide by all the provisions and conditions of this contract, does hereby insure David G. Rorick, of San Jacinto, Cali., A. T. & S. F. Railway System, by occupation a Passenger Train Conductor, under classification P. B., and agrees to idemnify him, subject to all the terms and conditions herein, against physical bodily injury as hereinafter defined.

The insurance under this policy shall extend only to physical bodily injury resulting in disability or death,

as hereinafter expressed, and which shall be effected while this contract is in force, solely by reason of and through external, violent, and accidental means, within the terms and conditions of this contract, and which shall independently of all other causes immediately, wholly, totally, and continuously from the date of the accident causing the injury disable the insured, and prevent him from doing or performing any work, labor, business or service, or any part thereof, within the conditions of this contract.

No liability by reason of any accident is assumed for more than one of the losses below specified; and payment for any one of such losses shall immediately terminate this policy and all liability hereunder.

ACCIDENTAL INJURIES INSURED AGAINST, SUBJECT TO THE DEFINITIONS AND CONDITIONS BELOW, AND PAYMENTS THEREFOR.

1. Loss of life, occurring within ninety days from the date of the accident causing the fatal injury.

2. Loss of both hands, occurring within ninety days from the date of the accident causing the injury.

3. Loss of both feet, occurring within ninety days from the date of the accident causing the injury.

4. Loss of one hand and one foot, occurring within ninety days from the date of the accident causing the injury.

5. Loss of both eyes (meaning absolute, total, and permanent blindness, and provided the insured possessed the sight of both eyes at the date of the injury), caused

by one accident and within ninety days of the accident causing the injury.

6. Immediate, continuous, and total disability for life, caused by one accident.

7. Loss of either foot or either hand, occurring within ninety days from the date of the accident causing the injury.

8. Loss of one eye (meaning absolute, total and permament blindness), occurring within ninety days from the date of the accident causing the injury.

9. Loss of time, per week, for a term not exceeding 104 consecutive weeks, when immediately, continuously and wholly disabled.

The payment for loss under provisions 1, 2, 3, 4 and 5, above specified, shall be the full principal sum named herein. The payments for loss under provisions 6 and 7, above specified, shall be one half of the principal sum named herein. The payment for loss under provision 8, above specified, shall be one-fourth of the principal sum named herein. The payment for loss of time, under provision 9, above specified, shall be at the rate of twenty-five dollars per week, not to exceed his average weekly wages, payable as hereinafter provided. Neither the insured nor his beneficiary shall be entitled to indemnity under any of the provisions 1 to 8, inclusive, above specified, for any injury received while the insured is claiming or receiving indemnity under provision 9 of this policy

Should death result soley from such physical bodily injury, within the conditions of this contract, said association will pay, at its home office, as provided herein,

the principal sum of five thousand dollars, to wife Issola Rorick, if living, otherwise to the legal representatives of the insured.

DEFINITIONS AND CONDITIONS.

(Subject to the following provisions hereof this policy is non-contestable, also non-forfeitable as to any change of occupation.)

This policy shall take effect at 12 o'cock noon (Standard time), on the date hereof, and is issued for the term of twelve months therefrom. It may be renewed from year to year by mutual agreement of said insured and said association. It shall also terminate without notice, according to the terms and conditions of his application, or of any order or obligation at any time given to secure any installment payment or upon failure to pay any installment payment when due.

By loss of hand or hands, or a foot or feet, is meant the actual severance of the hand or hands, foot or feet, above the wrist or ankle. By total disability for life is meant immediate, continuous, total inability to perform any and every kind of labor or work, whereby the insured might obtain a livelihood; and no claim for such disability shall arise until it shall have immediately and continuously existed for a period of two years from the date of the accident causing such disability. By wholly disabled is meant immediate, continuous, total inability to perform any work, labor, business or service, or any part thereof, from the date of the accident causing the injury.

If any injury resulting in rupture, or hernia shall cause disability or death entitling the insured or his beneficiaries to claim indemnity of this policy; or if any injury entitling insured or his beneficiaries to claim indemnity under this policy be caused or contributed to, by contract with poisonous substances; or by handling or using dynamite or other explosives; or by being engaged in gymnastic or athletic sports; or by exposure to unnecessary danger or perilous venture (except in an effort to save human life), whether the insured did or did not anticipate injury or death to result from such exposure or perilous venture; or by sun stroke or freezing; or by gas or poison in any form or manner; or by anything leaving no external or visible mark of contusion or wound upon the body sufficient to cause death (drowning only excepted), and it shall apear by an autopsy that such injury contributed to the death of the insured, then, in each and every such case, the limit of the association's liability shall be one-fourth of the sum otherwise payable, anything to the contrary herein notwithstanding.

If any injury causing disability or death entitling the insured to claim benefits under the provisions of this policy, be caused or contributed to by quarreling; or by fighting; or by the intentional act of any person other than the insured; or by the act of any person who at the time was insane; or by the sting or bite of a spider, bug, or insect; or by the use of intoxicants or narcotics; or by war or riot; or by any surgical operation of any medical, dental, or mechanical treatment, except by amputation

rendered necessary by an accidental injury and made within ninety days from the date of the event causing the injury; then, in each and every such case, the limit of the association's liability shall be one hundred dollars for fatal injury, or the gross sum of ten dollars for non-fatal injury, anything to the contrary herein notwithstanding.

INCREASE OF HAZARD.

If the injured be fatally or non-fatally injured within the intent and meaning of this policy, while engaged temporarily or otherwise in any occupation or work or risk classified by this association as more hazardous than that under which this policy is issued; or while doing any part of the work of any one so classified; or while exposed to any risk classified by this association as more hazardous than that under which this policy is issued, then, in such case, the association's liability, shall not exceed such an amount as the premiums paid will purchase for such more hazardous occupation, or work or risk, according to the classification of risks and premium rates and limits of this association. The classification of risks of this association is hereby made a part of this contract. If the insured be injured fatally or non-fatally while engaed temporarily or otherwise in any occupation or work or risk not classified by this association, this association's liability shall be rated upon the basis of the most hazardous occupation or work or risk mentioned in the classification of risks of this association; Provided, However, If the insured shall have made an extra payment for extra weekly indemnity, such extra payment

shall be excluded in ascertaining the amount due as benefits under provisions 1 to 8 inclusive, of this policy, if he be killed or sustain any of the losses enumerated in said provisions in a more hazardous occupation or work or risk than that named in this policy.

The death of the insured shall immediately terminate all liability under this policy under provision 9 hereof; and in no case shall the insured be entitled to recover for more than a total of 104 weeks hereunder. Upon the payment of the sum insured under the provisions 1, 2, 3, 4, 5, 6, 7 and 8, hereof, all further liability of the association shall immediately cease, and this policy be thereby terminated.

Injuries intentionally inflicted by the insured; or suicide, whether he be at the time sane or insane; or disappearances; or injuries or death caused or contributed to by disease or infection; or by an over-exertion or by lifting; or injuries received while engaged in, or in consequence of having engaged in, any unlawful act, whether the consequences of so engaging increased the risk or not; or while escaping from or evading any peace officer, are not covered by this policy.

This association reserves the right to terminate this policy at any time by refunding the pro rata amount the insured shall have paid in for the current year; provided that this policy shall not be terminated while the insured is under disability entitling him to indemnity. Upon termination of this policy from any cause, all personal liability of the insured for further premiums shall cease.

Notice of the accident causing the disability or death shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the accident, causing the disability or death, stating the name, occupation, and address of the insured, with date and full particulars of the accident causing the disability or death and causes thereof; and failure to give such notice within said time, shall render void all claims under this policy. Also satisfactory, verified, affirmative proof in writing, of the injury and duration of disability, under provision 9, must be furnished by the claimant within one month from the termination of disability, or within one month after the expiration of 104 weeks of such disability, if such disability shall so long continue; and under provision 8 such proof shall be furnished at the end of two years from the date of the accident causing the injury; and under provisions 1, 2, 3, 4, 5, 7 and 8 such proof must be furnished within four months from the happening of the accident causing such injury or death. Proofs herein required shall be upon blanks in use by the association and in accordance therewith, which blanks may be had upon request; failure to furnish such proofs as herein required shall forfeit all claims under this policy. All statements contained in the notice or proofs referred to shall be conclusive against the claimant or beneficiary, as to the matters therein stated, and may be introduced in evidence in any action on this contract. No legal proceedings for recovery hereunder shall be brought within ninety days after the receipt of such proofs at the home office. No suit at law or in equity shall be maintain-

able on this policy unless commenced within six months after the filing of such proofs, and failure to bring suit within such time shall render all claims hereunder null and void, any statutes of limitation to the contrary notwithstanding.

Indemnity.—In case the insured shall suffer an injury resulting in disability entitling him to indemnity under provision 9 of this policy, the insured shall be entitled to indemnity for such length of time only as he shall be under the care and treatment of a physician or surgeon. The indemnity for loss of time hereinunder shall be payable upon receipt at the home office of satisfactory proof of recovery from the injury or upon receipt of satisfactory proof that such disability has immediately and continuously existed for the period of 104 weeks. The indemnity for total disability for life, or for loss of both eyes, shall be payable within thirty days after receipt of satisfactory proof that such disability has continued for a period of two years. All other payments shall be made within ninety days after receipt of satisfactory proof of the accident and loss, as herein specified, at the home office, of the association, in the city of Indianapolis, Indiana. Settlement of any claim not specifically provided for by this policy shall not in any event operate as a precedent. Any payments on account of disability caused by accident which shall result in total continuous disability for life, or loss of both eyes, shall be deducted from the payment for total, continuous disability for life.

The beneficiary named in this policy has no vested interest herein, but this policy is the sole property of the

insured. The insured may release the association from the result of an injury, and such release shall bar all further rights of the insured and his beneficiary and his legal representatives. The association will change the beneficiary named herein on the written application of the insured and surrender of this policy.

No claim shall accrue or be payable under this policy if any representative or medical adviser of this association be denied the right to examine the person or body of the insured, in respect to any alleged injury or cause of death, when and so often as required, and in case of burial to exhume the body for postmortem examination; nor in any case of any postmortem examination by or on the part of the insured's representatives or beneficiary where the association shall not be given full notice and opportunity to attend and participate.

Any notice required to be given by any statute to the insured or to the beneficiary named herein, or to any other person designated by the insured or beneficiary, which shall be mailed to the last postoffice address of such person appearing upon the books of the association, shall be deemed a sufficient notice; and the affidavit of the secretary or assistant secretary of the association that such notice had been mailed to such person, according to the usual course of business of said corporation, shall be held to be conclusive proof of such notice, and binding upon every person acquiring any interest hereinunder.

The limits of travel and residence under this contract are the civilized and inhabited portions of the globe. All the terms and conditions of this contract are conditions precedent.

No person other than the secretary of this association has power to waive any forfeiture, or in any manner change this contract, and such waiver or change must be in writing endorsed thereon.

This policy of insurance is issued pursuant to the laws of the State of Indiana, under which the benefits herein provided are derived from payment by the policy holder. Such payments to be made as required by the association. It cancels any prior policy issued by this association to the insured named herein, unless especially stated in writing.

In testimony whereof, the said Railway Officials' and Employes' Accident Association has hereunto affixed its corporate seal and the signature of its president and secretary at Indianapolis, Indiana, this 22d day of December, one thousand eight hundred and ninety-nine.

[Corporation Seal] W. K. BELLIS,
Secretary.

CHALMERS BROWN,
President."

[Endorsed]:

"Form. Sant. R. N. C.—1.

"Non-contestable policy No. 169,722. Railway Officials' and Employes' Accident Association, Indianapolis, Ind. Name—D. G. Rorick, Employed by the S. T. & S. F., Railway System. Date of issue, December 22d, 1899. Principal sum, $5,000. Weekly indemnity, $25.

Important notice! In case of change of occupation notify Wm. K. Bellis, Secretary, Lock Box 493, Indianapolis Ind. Read carefully all the conditions of policy.

Wm. G. Meehan, Agent. Read this! In case of injury notice in accordance with the policy must be sent to W. K. Bellis, Sec. and Gen'l. Manager, Lock Box 493, Indianapolis, Ind."

(III.)

That he, the said David G. Rorick, did fully perform all of the obligations on his part to be performed and observed, by the terms, conditions and agreements in said policy contained, and was not at any time in default under any of the conditions of said policy.

(IV.)

That plaintiff was, at the time of the making and delivery of the said policy of insurance, as aforesaid, the wife of the said David G. Rorick, and is, and at all the times herein mentioned was, the beneficiary named therein.

(V.)

That between the 11th day of March, 1900, and the 14th day of March, 1900, while said policy was in full force and effect as aforesaid, the said David G. Rorick received and sustained physical and bodily injury, to wit, traumatic injury of the cranium, at the vortex thereof, which, independent of all other causes, produced and caused his death within ninety days thereafter, to wit, on the 26th day of March, 1900, at the county of San Bernardino, State of California. That the said injury was effected solely by reason of and through external, violent and accidental means, within the terms and conditions of said policy.

(VI.)

That said injury was caused by the said David G. Rorick, while acting as conductor of a passenger train of the Atchison, Topeka & Santa Fe Railway Sysem, raising his head and thereby striking a bolt or other iron in a railway car.

(VII.)

That the injury was at the time supposed to be trivial, and not such as did or would result in either "disability or death."

(VIII.)

That said deceased, notwithstanding said injury, continued thereafter for six days to perform his duties as such conductor. That there was no visible or outward sign of injury resulting from said accident. That he suffered severe pains in the head which increased in violence until his death. That physicians were called on March 21st, 1900, and found him suffering as aforesaid and pronounced his disease as that of acute neuralgia.

(IX.)

That on, to wit, the 20th day of March, 1900, the said David G. Rorick did, as a direct and proximate result of said injury, become insane, and he did from that time until his death continue to be insane. That the plaintiff did not at any time know or have any reason to believe that his said insanity was caused by said injury.

(X.)

That neither the said deceased nor the plaintiff knew or believed that his, the said David G. Rorick's, sickness

and suffering were caused by said accident, nor did the attending physicians attribute the same to the injury aforementioned.

(XI.)

That the cause of his death, and that it was the result of said injury, was first discovered by and as the result of an autopsy held by physicians immediately after the death of the insured, and until then it was not known or believed that his sickness, disability, or death was caused by or the result of said injury.

(XII.)

That upon the discovery of the cause of death the plaintiff within four days thereafter notified the defendant of said injury and consequent death in all things as required by the provisions of said policy, by depositing notice thereof in writing in the United States postoffice at Patton, California, duly enclosed in the proper envelope, prepaying the postage thereon, and addressed to W. K. Bellis, Secretary and General Manager, Lock Box 493, Indianapolis, Indiana; and upon request of plaintiff, made on the 30th day of March, 1900, said defendant did furnish the plaintiff all necessary and proper forms or blanks for making proof of the said accident and death of said insured, and within four months after the happening of said accident, to wit, on the 27th day of June, 1900, said plaintiff, as beneficiary under said policy, did prepare and cause to be prepared statements in writing showing due and full proof of the injury and death of said David G. Rorick, in all respects as required by and under the rules and regulations of said defendant corporation, which said statements were made upon and did

fully comply with said forms or blanks so furnished by defendant unto said plaintiff as aforesaid, and did fully present and submit the same to the said defendant corporation at its home office in the city of Indianapolis, in the State of Indiana. That the said defendant corporation did duly receive said notice of the said accident causing said death and the said proofs of death, and ever since and for more than ninety days last past has had, and now has, the same in its possession.

(XIII.)

That at the time and place of filing said proofs of death as aforesaid said plaintiff demanded of said defendant corporation payment of the insurance money, to wit, the sum of five thousand dollars, as provided in and by the terms of said policy, and then and there said defendant did refuse, and for more than ninety days last past refused, and still refuses, to pay plaintiff said sum of five thousand dollars, or any part thereof.

(XIV.)

That the said David G. Rorick (the said insured) and this plaintiff, as such beneficiary under said policy have respectively performed and complied with all the obligations and conditions upon their part to be performed and in said policy contained, and said policy was, and is now, in full force and effect, and an obligation in said amount of five thousand dollars to be paid by the said defendant to this plaintiff.

(XV.)

That the said sum of said insurance money, to wit, the said sum of five thousand dollars, due under said policy

has not, nor has any part thereof been paid, and that the whole of said money is now due and unpaid, and owing from said defendant to this plaintiff.

Wherefore plaintiff prays judgment in her favor and against said defendant corporation in the sum of five thousand dollars, and interest thereon at the rate of seven per cent per annum, according to law from the time of said demand for the same, and for such other and further relief as the nature of the case may require, and for costs of suit.

ALLISON & ANNABELL,
WORKS, LEE & WORKS, and
HUNTER & SUMMERFIELD,
Attorneys for Plaintiff.

State of California,
County of Los Angeles. } ss.

Issola Rorick, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has heard read the foregoing complaint, and knows the contents thereof, and that the same is true of her own knowledge.

[Seal] ISSOLA RORICK.

Subscribed and sworn to before me this 18th day of February, 1902.

BENJAMIN S. HUNTER,
Notary Public in and for Los Angeles County, California.

[Endorsed]: No. 987. In the Circuit Court of the United States, in and for the Ninth Circuit, Southern Division of the Southern District of California. Issola

Rorick, Plaintiff, vs. Railway Officials' and Employes' Accident Association, a Corporation, Defendant. Second Amended Complaint. Allison & Annabell, Works, Lee & Works, Hunter & Summerfield, Attorneys for Plaintiff. Filed February 18, 1902. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Southern Division of the Southern District of California.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.

Demurrer to Second Amended Complaint.

Now comes the defendant above-named, in the cause above-entitled, and demurs to plaintiff's second amended complaint herein and for cause of demurrer, alleges:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

OTIS & GREGG.
Solicitors for Defendant.

We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

OTIS & GREGG.
Solicitors for Defendant.

[Endorsed]: No. 987. In the Circuit Court of the United States in and for the Ninth Circuit, Southern Division of the Southern District of California. Issola Rorick, Plaintiff, vs. Railway Officials' and Employes' Accident Association, defendant. Demurrer to Second Amended Complaint. Filed February 26, 1902. Wm. M. Van Dyke, Clerk. Otis & Gregg, Attorneys for Defendant.

At a stated term, to wit, the January term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Monday the tenth day of March, in the year of our Lord, one thousand nine hundred and two. Present: The Honorable OLIN WELLBORN, District Judge.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.
No. 987.

Order Sustaining Demurrer to Second Amended Complaint.

This cause coming on this day to be heard on defendant's demurrer to plaintiff's second amended complaint, J. D. Works, Esq., appearing as counsel for plaintiff and

F. W. Gregg, Esq., appearing as counsel for defendant, and said demurrer having been argued in support thereof by F. W. Gregg, Esq., of counsel as aforesaid for defendant, and in opposition thereto by J. D. Works, Esq., of counsel as aforesaid for plaintiff, and Court thereupon, at the hour of 12:15 o'clock P. M., having taken a recess until the hour of 2:10 o'clock P. M. of this day, and now at the hour of 2:10 o'clock P. M., Court having reconvened, and counsel being present as before, and said demurrer having been further argued in opposition thereto by J. D. Works, Esq., of counsel as aforesaid for plaintiff, and having been further argued in support thereof in reply by F. W. Gregg, Esq., of counsel as aforesaid for defendant, and having been submitted to the Court for its consideration and decision, it is now by the Court ordered that said demurrer be, and the same hereby is, sustained, and that the said action be dismissed; to which ruling of the Court plaintiff, by her counsel, notes and is allowed an exception, which is duly noted.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said Court March 10th, 1902, in the cause entitled Issola Rorick, Plaintiff, vs. Railway Officials' and Employes' Accident Association, a Corporation, Defendant. No. 987, Southern Division, and remaining of record therein.

Attest my hand and the seal of said Circuit Court, this 10th day of March, A. D. 1902.

[Seal] WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 987. United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Issola Rorick vs. Railway Officials' and Employes' Accident Association, a Corporation. Certified Copy. Order Sustaining Demurrer to Second Amended Complaint. Filed March 10, 1902. Wm. V. Van Dyke, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.
No. 987.

Judgment.

The demurrer of defendant to plaintiff's second amended complaint having on this the 10th day of March, 1902, being a day in the January term, A. D. 1902, of said Circuit Court of the United States for the Southern District of California, been sustained by the Court, and the Court, having ordered that the said action be dismissed.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff, Issola Rorick take nothing by this action

as against said Railway Officials and Employes' Accident Association, a corporation, defendant, and that said defendant Railway Officials' and Employes' Accident Association, a corporation, go hereof without day, and that said defendant Railway Officials' and Employes' Accident Association, a corporation have and recover of and from said plaintiff Issola Rorick, its said defendant's costs in this behalf, taxed at $ ————

Judgment entered March 10th, 1902.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 987. United States Circuit Court, Ninth Circuit, Southern District of California. Southern Division. Issola Rorick vs. Railway Officials' and Employes' Accident Association, a Corporation. Copy Judgment. Filed March 10, 1902. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.
No. 987.

Conclusions of the Court on Demurrer.

The amended complaint, in my opinion, does not show compliance with the requirement of the policy as to notice, nor any lawful excuse for the failure.

The pertinent clauses of the policy are as follows:

"Notice of the accident causing disability or death shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the accident causing the disability or death, stating the name, occupation, and address of the insured, with date and full particulars of the accident causing the disability or death and causes thereof; and failure to give such notice within said time shall render void all claims under this policy.

* * * * * * * *

"All the terms and conditions of this contract are conditions precedent."

The notice agreed upon, it will be observed, is a notice of the accident, and the time allowed for giving it, "within fifteen days" runs from the date of the accident. These provisions, unlike corresponding provisions of the policies sued on in some of the cases cited by plaintiff; are neither obscure nor ambiguous, but clear and imperative. Nor does the notice belong to that class, which courts decline to enforce, because of unreasonableness, such as notices of disability or death, where the contingency happens after the limitation has expired. In a case such as those last mentioned it may well be held that notice within the time specified, being impossible, was not contemplated by the parties to the contract.

The alleged insanity of the insured, whatever might have been its effect as an excuse for his failure to give the prescribed notice had he survived and himself sued to recover damages resulting from his own disability, is

not available in the present action for the purpose indicated, for the reason, that the plaintiff herself should have given the notice.

The demurrer will be sustained. I do not know that the plaintiff desires further opportunity to amend, but leave to do so within ten days will be granted.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 987. United States Circuit Court, Southern District of California. Issola Rorick vs. Railway Officials' and Employes' Accident Association, a Corporation. Conclusions of the Court on Demurrer. Filed January 20, 1902. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.

Petition for Writ of Error.

The above-named plaintiff, Issola Rorick, conceiving herself aggrieved by the judgment entered on the 10th day of March, 1902, in the above-entitled cause, hereby

prays the Court for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, in said cause, and that a transcript of the records and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said Circuit Court of the United States for the Ninth Circuit.

Los Angeles, Cal., March 17, 1902.

HUNTER & SUMMERFIELD,
WORKS, LEE & WORKS,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 987. Southern Division, United States Circuit Court, Ninth Circuit, Southern District of California. Issola Rorick, vs. Railway Officials' and Employes' Accident Association. Petition for Writ of Error. Filed March 17, 1902. Wm. M. Van Dyke, Clerk. Hunter & Summerfield, Works, Lee & Works, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

ISSOLA RORICK,
Plaintiff,

vs.

RAILWAY OFFICIALS' AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.

Assignment of Errors.

Now comes the above-named plaintiff in error, Issola Rorick, by Hunter & Summerfield and Works, Lee & Works, her counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

1. The Circuit Court of the United tSates, Ninth Circuit, Southern District of California, Southern Division, erred in sustaining the defendant's demurrer to the second amended complaint.

2. That said Court erred in dismissing the plaintiff's complaint.

3. That said Court erred in rendering judgment in said cause that the plaintiff take nothing by her action, and in favor of the defendant for its costs.

4. That said Court erred in holding and deciding that the notice of the accident, injury and death of the assured mentioned in said complaint was not given in time, and that therefore the plaintiff was not entitled to recover.

Wherefore, the said Issola Rorick prays that the judgment of the said Circuit Court of the United States, Southern District, Southern Division of California, be in all things reversed.

HUNTER & SUMMERFIELD,
WORKS, LEE & WORKS,
Counsel for Plaintiff in Error.

[Endorsed]: Original. No. 987. Southern Division, United States Circuit Court, Ninth Circuit, Southern District of California. Issola Rorick, vs. Railway Officials' and Employes' Accident Association. Assignment of Errors. Filed March 17, 1902. Wm. M. Van Dyke, Clerk. Hunter & Summerfield, Works, Lee & Works, Rooms 420 to 425 Henne Building, Los Angeles, Cal., Solicitors for Plaintiff.

At a stated term, to wit, the January term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Monday, the seventeenth day of March, in the year of our Lord one thousand nine hundred and two. Present: The Honorable OLIN WELLBORN, District Judge.

ISSOLA RORICK,
Plaintiff,
vs.
RAILWAY OFFICIALS AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),
Defendant.
No. 987.

Order Allowing Writ of Error and Fixing Amount of Bond.

On reading and filing the petition of plaintiff, Issola Rorick, praying for the allowance of a writ of error in the above-entitled cause, returnable before the United States Circuit Court of Appeals for the Ninth Circuit, and on motion of Benj. G. Hunter, Esq., of counsel for said plaintiff, it is ordered that said petition be, and the same hereby is allowed and granted, returnable before the United States Circuit Court of Appeals for the Ninth Circuit, on the 14th day of April, 1902, and that a transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, be

sent to the said United States Circuit Court of Appeals for the Ninth Circuit; it is further ordered that the amount of the bond on appeal to be given by the plaintiff in error be, and the same hereby is, fixed at three hundred (300) dollars, and that the bond in that amount tendered by said plaintiff in error be, and the same hereby is, approved.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

ISSOLA RORICK,

Plaintiff,

vs.

RAILWAY OFFICIALS AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),

Defendant.

Bond.

Know all men by these presents, that we, Issola Rorick, of the county of Los Angeles, State of California, and The American Bonding and Trust Company of Baltimore City, are held and firmly bound unto the above-named Railway Officials and Employes' Accident Association, a corporation, in the sum of three hundred dollars ($300.00), to be paid to it, for the payment of which, well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. sealed with our seals and dated the 14th day of March, 1902.

Whereas, the above-named Issola Rorick has prosecuted her writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment by the Judge of the Circuit Court of the United States of the Ninth Circuit, Southern District of California, Southern Division:

Now, therefore, the condition of this obligation is such that if the above-named Issola Rorick shall prosecute said writ of error to effect, and answer all damages and costs, if she fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,

[Seal] By W. T. CRAIG,
Vice-President.

Attest: WM. DIETERLE,
Assistant Secretary.

Approved.

OLIN WELLBORN
Judge.

[Endorsed]: No. 987. Southern Division, United States Circuit Court, Ninth Circuit, Southern District of California. Issola Rorick vs. Railway Officials and Employes' Accident Association. Bond on Appeal. Filed March 17, 1902. Wm. M. Van Dyke, Clerk. Hunter & Summerfield, Works, Lee & Works, Rooms 420 to 425 Henne Building, Los Angeles Cal., Solicitors for Plaintiff.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

ISSOLA RORICK,

Plaintiff,

vs.

RAILWAY OFFICIALS AND EMPLOYES' ACCIDENT ASSOCIATION (a Corporation),

Defendant.

No. 987.

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing twenty-nine (29) typewritten pages, numbered from 1 to 29, inclusive, and comprised in one (1) volume, to be a full, true, and correct copy of the record, pleadings, opinion of the Court, assignment of errors and of all proceedings and papers on which the judgment was made and entered in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

I do further certify that the cost of the foregoing record is $15.30, and that the amount thereof has been paid me by Issola Rorick, the plaintiff in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 29th day of March, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 818. In the United States Circuit Court of Appeals for the Ninth Circuit. Issola Rorick, Plaintiff in Error, vs. The Railway Officials' and Employes' Accident Association (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Southern District of California.

Filed April 2, 1902.

F. D. MONCKTON,

Clerk.

NO. 818

IN THE

UNITED STATES

Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN DIVISION.

Issola Rorick,

Plaintiff in Error,

vs.

Railway Officials and Employees Accident Association, a corporation,

Defendant in Error.

Brief of Plaintiff in Error.

HUNTER & SUMMERFIELD,
WORKS, LEE & WORKS,

Counsel for Plaintiff in Error.

Filed this *day of April, 1902.*

Clerk,

By .... *Deputy Clerk.*

Tel. James 4141 T. J. Spencer, Law Printer, 238-242 New High St.

IN THE

UNITED STATES

Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN DIVISION.

Issola Rorick,
Plaintiff in Error,
vs.
Railway Officials and Employees Accident Association, a corporation,
Defendant in Error,

STATEMENT.

This is an action brought by the plaintiff in error to recover upon a policy of life insurance issued by the defendant in error to her husband, David G. Rorick, the policy being made payable to the assured in case of injury not resulting in death, and to the plaintiff in error in case of death resulting from such injuries. The policy contains this clause:

"In consideration of his written application, which is hereby made a part hereof, and the agreement to fully perform and provide by all the provisions and condi-

tions of this contract, does hereby insure David G. Rorick, of San Jacinto, Cali., A. T. & S. F. Railway System, by occupation a passenger train conductor, under classification P. B., and agrees to indemnify him, subject to all the terms and conditions herein, against physical bodily injury as hereinafter defined.

"The insurance under this policy shall extend only to physical bodily injury *resulting in disability or death*, as hereinafter expressed, and which shall be effected while this contract is in force, solely by reason of and through external violent and accidental means, within the terms and conditions of this contract, and which shall *independently of all other causes immediately, wholly, totally and continuously from the date of the accident causing the injury disable the insured, and prevent him from doing or performing any work, labor, business or service, or any part thereof, within the conditions of this contract.*"

The accidental injuries insured against are specifically defined in the policy, and are nine in number.

See record, pp. 7 and 8.

Most of the cases referred to are payable where the injury insured against occurs, within ninety days from the date of the accident causing the injury, but in case of disability for life, the injury must be such as to cause immediate, continuous and total disability for life, caused by one accident. The same is true with respect to loss of time per week allowed for. The policy further provides:

"The payment for loss under provisions 1, 2, 3, 4 and 5, above specified, shall be the full principal sum named herein. The payments for loss under provisions 6 and 7, above specified, shall be one-half of the principal sum named herein. The payment for loss under provision

8, above specified, shall be one-fourth of the principal sum named herein. The payment for loss of time, under provision 9, above specified, shall be at the rate of twenty-five dollars per week, not to exceed his average weekly wages, payable as hereinafter provided. Neither the insured nor his beneficiary shall be entitled to indemnity under any of the provisions 1 to 8, inclusive, above specified, for any injury received while the insured is claiming or receiving indemnity under provision 9 of this policy."

And as to injury resulting in death, the policy provides as follows:

"Should death result solely from such physical bodily injury, within the conditions of this contract, said association will pay, at its home office, as provided herein, the principal sum of five thousand dollars, to wife, Issola Rorick, if living, otherwise to the legal representatives of the insured."

The policy contains this further provision:

"Notice of the accident, causing the disability or death, shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the accident *causing the disability or death*, stating the name, occupation and address of the insured, with date and full particulars of the accident causing the disability or death and causer thereof, and failure to give such notice within said time, shall render void all claims under this policy."

In this case the injury alleged to have occurred to the assured resulted in death within fifteen days after the injury occurred, but, as alleged in the complaint, at the time of the injury it was trivial in character, and was not regarded seriously by either the assured or the

plaintiff in error, the beneficiary under the policy. The complaint alleges as follows:

V.

That between the 11th day of March, 1900, and the 14th day of March, 1900, while said policy was in full force and effect as aforesaid, the said David G. Rorick received and sustained physical and bodily injury, to wit: traumatic injury of the cranium, at the vortex thereof, which, independent of all other causes, produced and caused his death within ninety days thereafter, to wit: on the 26th day of March, 1900, at the county of San Bernardino, state of California. That the said injury was effected solely by reason of and through external, violent and accidental means, within the terms and conditions of said policy.

VI.

That said injury was caused by the said David G. Rorick, while acting as conductor of a passenger train of the Atchison, Topeka & Santa Fe Railway system, raising his head and thereby striking a bolt or other iron in a railway car.

VII.

That the injury was at the time supposed to be trivial and not such as did or would result in either "disability or death."

VIII.

That said deceased, notwithstanding said injury, continued thereafter for six days to perform his duties as such conductor; that there was no visible or outward sign of injury resulting from said accident; that he suffered severe pains in the head which increased in violence until his death; that physicians were called on March 21st, 1900, and found him suffer-

ing as aforesaid and pronounced his disease as that of acute neuralgia.

IX.

That on, to wit: the 20th day of March, 1900, the said David G. Rorick did, as a direct and proximate result of said injury, become insane, and he did from that time until his death continue to be insane; that the plaintiff did not at any time know or have any reason to believe that his said insanity was caused by said injury.

X.

That neither the said deceased nor the plaintiff knew or believed that his, the said David G. Rorick's, sickness and suffering were caused by said accident, nor did the attending physcians attribute the same to the injury aforementioned.

XI.

That the cause of his death and that it was the result of said injury was first discovered by and as the result of an autopsy held by physicians immediately after the death of the insured, and until then it was not known or believed that his sickness, disability or death was caused by or the result of said injury.

The complaint further alleges that upon the discovery of the cause of death the plaintiff, within four days thereafter, notified the defendant of said injury and consequent death, in all things as required by the provisions of said policy.

Thus it will be seen that the injury occurred to the assured between the 11th and 14th days of March, 1900; that the death occurred on the 26th day of March, 1900, which would be within fifteen days of the time the injury occurred; that the injury was caused by the

assured raising his head and striking a bolt or other iron in a railway car; that it was supposed to be trivial, and not such as did or would result in either disability or death; that he continued thereafter for six days to perform his duties as such conductor, and that there was no visible or outward sign of injury resulting from the accident; that on the 20th day of March, which was within ten days after the injury occurred, the assured became, as a direct and proximate result of the injury, insane, and continued in that condition until the time of his death; that neither the assured nor the plaintiff in error believed or had reason to believe that the sickness and suffering was caused by the accident, and that the attending physicians did not attribute it to that cause; that the cause of his death, and that it resulted from his injury, was first discovered as the result of the autopsy held by physicians immediately after the death, and the notice of loss was given within four days after that time.

The complaint was demurred to by the defendant in error, and the demurrer sustained by the court below on the ground that the notice of loss was not given within the time required by the policy of insurance, and this is the only question in the case. The assignments of error are as follows:

"1. The Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, erred in sustaining the defendant's demurrer to the second amended complaint.

"2. That said Court erred in dismissing the plaintiff's complaint.

"3. That said Court erred in rendering judgment

in said cause that the plaintiff take nothing by her action, and in favor of the defendant for its costs.

"4. That said Court erred in holding and deciding that the notice of the accident, injury and death of the assured mentioned in said complaint was not given in time, and that therefore the plaintiff was not entitled to recover."

ARGUMENT.

The court below held that the policy of insurance required, without qualification, that notice of loss must be given within fifteen days from the date of the accident, and that the fact of the insanity of the assured, the trivial character of the injury at the time of its occurrence, the fact that it did not cause disability such as was insured against in the policy until several days after its occurrence, that neither the assured nor the plaintiff in error, the beneficiary under the policy in case of death, knew or believed that the disability, illness and suffering of the assured which finally resulted in his death, was caused by the injury itself, that the physicians in attendance attributed it to an entirely different cause, and that the actual cause of the injury was not discovered until after his death, furnished no excuse whatever for the failure to comply with the provision of the policy requiring notice of the injury to be given within the time mentioned; and this is the question, and the only question, presented by this appeal.

In determining the question as to whether the requirement of notice within fifteen days after the accident is imperative and without qualification, and whether the condition upon which notice must be given

arose immediately upon the injury being inflicted, or whether the condition only arose when the injury became such as to cause the disability, and whether, in any event, the duty or obligation of giving such notice was imposed upon the plaintiff in error, who had no interest in the policy except upon the death of the assured, could have arisen until death occurred, must be determined by the terms of the policy taken as a whole. The question cannot justly be made to depend upon the single provision in the policy requiring notice. It is necessary to look to the provisions of the policy to determine whether the insurance company could become liable in any event until the injury became such as to result in disability, and whether the corresponding duty of the assured to give notice could arise until the injury assumed that degree of seriousness.

The agreement of the defendant in error, as expressed in the policy, is "*to indemnify him, subject to all the terms and conditions herein, against physical bodily injury, as hereinafter defined.*"

"The insurance under this policy shall extend only to physical bodily injuries *resulting in disability or death*, as hereinafter expressed. * * * And which shall, independently of all other causes, immediately, wholly, totally and continuously from the date of the accident causing the injury, *disable the insured, and prevent him from doing or performing any work, labor, business or service, or any part thereof*, within the conditions of this contract."

The policy contains this further clause:

"No liability by reason of any accident is assumed for more than one of the losses below specified, and pay-

ment for any one of such losses shall immediately terminate this policy and all liability thereunder."

Then follows an enumeration of the injuries that are covered by the insurance, from one to nine. And after further provisions not necessary to be noticed in this connection, is this clause in the policy, which is the only one giving a right of action to the plaintiff in error under the policy:

"Should death result solely from such physical bodily injury within the conditions of this contract, said association will pay, at its home office, as provided herein, the principal sum of five thousand dollars to wife, Issola Rorick, if living, otherwise to legal representatives of the insured."

The policy requires that notice shall be given "of the accident causing the disability or death."

Record, p. 13.

Now, it will be seen that there is no liability on the part of the insurance company under this policy until an injury is inflicted which causes either disability or death. It is only in case of such injury that notice is required to be given at all. The obligation and liability of the insurer to pay in case of injury, and that of the assured or the beneficiary under the policy to give notice of the injury, must be mutual. The kind of injury that would fix the liability of the insurer would impose upon the assured the necessity of giving the notice required by the policy, and not otherwise. The terms of the policy throughout are confined exclusively to such injuries as result either in disability or death. It cannot be said with any degree of reason that while the policy limits the liability of the insurer to that class

of injuries, that the requirement relating to the notice, which in terms applies, as does every other provision in the policy, to an accident causing disability or death, can attach immediately upon an accident happening which results in no such injury. In this case, as shown by the allegations of the complaint, the injury resulting from the bumping of the head against the car gave no outward sign of injury; that it was regarded as trivial in its nature, and that no disability in fact occurred until six days after that time, the assured continuing to perform his daily duty of conductor on the train until the end of that time. Now, surely here was not an injury causing either disability or death until six days after the accident itself occurred. Until it did cause disability, no liability attached to the company. Until such disability did occur, no duty of giving notice imposed itself upon the assured, because the injury was not within the terms of the policy at all, and the requisite notice was given within the fifteen days after the disability actually occurred, which brought the notice within the terms of the policy.

In this case there are at least three excuses for not having given the notice within the time prescribed in the policy.

1. That the injury did not become one causing disability until at least six days after the injury itself occurred, thereby imposing the obligation to give the notice under the terms of the policy.

2. Before the expiration of the fifteen days, the assured had become insane.

3. There was no obligation on the part of the bene-

ficiary under the policy, the plaintiff in error here, to give the notice until death occurred, because until that time she had no interest in the policy, and was under no obligation to give such notice.

If we turn to the authorities bearing upon the question, they seem to us to be clear and conclusive against the ruling of the court below. It was very justly said by the learned judge, that while the sympathy of the court might be with the plaintiff in error, care should be taken not to allow that consideration to affect the proper application of the rules of law in construing the terms of the policy, and the effect of the failure to give the necessary notice. But in the conscientious effort to avoid being influenced by considerations of sympathy, the learned judge has gone to the other extreme, and given a construction to the authorities that cannot be borne out. We cite the following authorities as supporting our contention that the notice in this case was given in time:

Western Commercial Traveler's Assn. v. Smith, 56 U. S. Appeals 393; 85 Fed. Rep. 401; 40 L. R. A. 653;

Oddfellows' Frat. Acc. Assn. v. Earl, 70 Fed. Rep. 16; 16 U. S. C. C. A. 596;

McFarland v. U. S. Mut. Acc. Assn., 27 N. W. Rep. 436;

Hoffman v. Manufacturers' Acc. Ind. Co., 56 Mo. App. 301;

Trippe v. Provident Fund Soc., 23 N. Y. Supp. 173;

Phillips v. U. S. Ben. Soc., etc., 79 N. W. Rep. 1.

Peele v. Provident Fund Soc. 44 N. E 661.

In the case of Phillips v. U. S. Ben. Soc., 79 N. W. Rep. 1, the provision in the policy was that in all cases of accident or sickness, immediate notice be given in writing, and that "failure to give such notice within five days from the happening of such accident or beginning of sickness renders the claim invalid, and it cannot be recognized or paid."

The plaintiff served notice in writing that he was totally disabled by neuralgia from doing any work. The notice in writing upon the diagnosis of the case by the plaintiff's physician. Subsequently, an examination was made by another physician, who attributed the illness to an injury which the plaintiff claimed to have received in the car shops at Ann Arbor. Thereupon the physician served a written notice that "he had been suffering for several weeks from an injury sustained in the car shops, which at that time was reported by his physician as sciatica, and treated as such, without success. Dr. Osborne, the health officer, and I, examined Mr. Phillips, and failed to find any trace of rheumatism. Whatever information you may require concerning this case will be freely furnished."

Still later, the plaintiff furnished proofs of loss on the 26th day of February, 1897, and on the 20th of April following, brought suit to recover on the policy. It was claimed in that case that the plaintiff did not give timely notice of his injury in accordance with the provisions of the charter and by-laws. In passing upon that question, the Supreme Court of Michigan said:

"Notice was served upon the Company with promptness after he had been informed by one of his physicians that his illness did not result from disease, but

from an accident. We do not think that the first notice that he was suffering with neuralgia was binding upon him. It would be a hard rule, and one which the rules of the Company must place beyond doubt, which would deprive a member of his benefit through the mistake of his physician. The notice was served as soon as he ascertained that the accident with which he had met was the occasion of his trouble. We think this is a sufficient compliance with the by-law."

That was a much stronger case in favor of the insurance company than the one at bar. Here the liability sought to be enforced is on account of the death of the assured in favor of one having no rights in the policy or cause of action until the death occurred. Neither the assured nor the beneficiary knew that the injury was the cause of the illness which eventually resulted in death. They were expressly informed by the attending physicians to the contrary. She was not informed of the true cause of the death until it was discovered by the autopsy after the death occurred. She gave notice within four days after that time. This was undoubtedly a full compliance with the provisions of the policy, assuming that there was any liability on her part to give the notice before the death occurred, which alone gave her an interest in the policy.

In the case of Odd Fellows' Frat. Acc. Assn. v. Earl, 70 Fed. Rep. 16, the policy was much like the one here under consideration. There, the insurance was against "bodily injury effected through external, violent and accidental means causing an external, visible mark upon the body," but, as said by the court:

"Such accident is not itself the subject of compensa-

tion. It must occasion in the certificate holder incapacity to continue his stated occupation, or result in the loss to him of hand, foot, eyes, or life. These specified consequences of the accident are the risks insured against. * * * In case death results, five thousand dollars is to be paid to the beneficiary, but as part of this all sums to which the certificate holder had previously become entitled are likewise reckoned. It nowhere appears in this certificate that there must have been the incapacity for business originating contemporaneously with the accident in order to make a claim for ultimate bodily hurt or loss of life. A claim of either kind might arise at the time of or within a few days after the accident. But the point to be noted is that if the incapacity for business as described does not follow the accident immediately or at once, no claim can arise or exist in favor of the certificate holder, *till a specified bodily disablement results, or in favor of the beneficiary till death results.*"

In this respect, the policy is precisely like the one at bar. There was no liability on the part of the company until such injury was received as resulted either in disablement or death. There are two insurances in the policy, one in favor of the assured in case he was disabled, and the other in favor of the beneficiary, the plaintiff in error, in case death resulted. They were just as separate and distinct as if two policies had been issued. If there had been a policy of insurance issued entitling the beneficiary to insurance in case of the death of the assured under the circumstances present here, could it be claimed for a moment that the beneficiary, the assured being insane, could take any action under the policy by giving notice or otherwise, until the condition happened, viz.: the death of the assured,

which gave her an interest in the policy, or any right to act thereunder?

In the case under consideration the requirement as to notice was as follows:

"Written notice shall be given the said association at Westfield, Mass., *within ten days of the date of the accident and injury for which claim of indemnity or benefit is made*, with full particulars thereof, including a statement of the time, place, and cause of the accident, the nature of the injury, and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

The claim for insurance resulted from the following facts:

"On August 4, 1892, Dr. Earl accidentally stepped on a wire nail, receiving therefrom a puncture in his foot. The wound, though visible, was very slight. Dr. Earl kept on with his professional work without any interruption whatever, for fourteen days immediately following the accident. He then became sick, and as the result of such accident died of lockjaw on the 27th day of said month. Proofs of loss were tendered by Mrs. Earle in due time, but the association declined to pay, insisting that a notice to the association of the accident within ten days of the date thereof was a condition precedent to liability, and that such notice had not been given."

In that case, as in this, the requisite of notice included the giving of full particulars of the accident causing the disability or death, and the causes thereof. In passing upon the question as to the sufficiency of this notice, the Court said:

"The notice here called for is plainly to be given when a claim for indemnity by the certificate holder, or of benefit by the beneficiary, is extant. If the incapacity, contemporaneous in origin with the date of the accident, has resulted, or if the mutilation or death has taken place, within the ten days, so that a claim for indemnity or benefit is outstanding, the ten days' notice seems to be required. But we see in this language no express call for such a notice if no 'claim of indemnity or benefit' be then made. If the words were: 'Written notice shall be, or shall have been, given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim of indemnity or benefit is made,' etc., the question whether or not this defendant in error forfeited to the association the compensation to be paid her under this policy would arise. But Mrs. Earl made no claim for benefit against the association when said ten days expired. Her case, therefore, does not, and the learned counsel for plaintiff in error concede that it does not, fall within the provision quoted.

"As has already been suggested, this contract does not provide insurance against the accident itself, or the consequences in general of any accident. The compensation is to be given for specified hurts or losses resulting from accident, as that word is defined in the contract. The notice above called for must describe, not only the accident, but 'the nature of the injury,' for which the compensation is sought. From the standpoint of Mrs. Earl, the injury was the loss of her husband by death. Such a notice as is described could not have been given in her case, since the injury insured against, and which constituted the subject of her 'claim for benefit,' had not resulted when the ten-day period expired."

The extract given from the opinion, and the further discussion of the subject by the court in that case, is conclusive of the question presented here, if that case is to be followed. There is absolutely no difference in legal effect between the requirements as to notice in that case and the failure to give the notice and the questions presented here. The cases are alike in all material respects. The decision was by the Circuit Court of Appeals for the Seventh Circuit, and affirmed the judgment of the Circuit Court of the United States for the Western District of Wisconsin.

The case of Hoffman v. Accident Indemnity Company, 56 Mo. Appeals 301, is directly in point. The notice in that case was similar in all respects to the one at bar. The claim was by the beneficiary on account of the death of the assured. The requirement as to notice in that case was as follows:

"In the event of an accident or injury for which or from which, directly or indirectly, any claim may be made under this certificate, either for weekly indemnity or loss of limbs or loss of both eyes or for the death benefit, immediate notice shall be given in writing, signed by the member or his attending physician, or in case of death, by the beneficiary, addressed to the secretary of the company at Geneva, N. Y., stating the full particulars as to when, where and how it occurred, and the occupation of the member at the time, and his address, and the failure to give such immediate notice mailed within ten days of the happening of such accident shall invalidate all claim under this certificate."

It will be noticed that in that case the notice was required to be given within ten days of the happening of the accident, which is precisely the same as the notice

in the policy under consideration except as to the length of time. The death in that case did not occur until forty days after the happening of the accident, and notice was not given until after the death. It was contended there, as it is here, that the beneficiary was not entitled to recover because notice was not given within ten days after the accident, as required by the policy. But it was held that there was no obligation on the part of the beneficiary to give notice until the death of the assured, which alone gave her an interest in the policy or the right to act thereunder, the court saying:

"The beneficiary, until the death of the insured, had, at most, only an inchoate and contingent interest in the proceedings. The insurer could not, until that event took place, recognize her as a part of the contract having a present interest therein. She could have no claim under the contract until the death of the insured, and therefore she could give no notice of the accident or injury until that event occurred. She could not give the notice after the death of the insured, because of the remoteness of that occurrence from that of the injury."

Thus holding that in that case no notice at all was necessary. The further point was decided by the court in that case, that the requirement of notice as applied to the beneficiary was unreasonable, and therefore void. The same is true of this case unless the requirement can be construed as calling upon the beneficiary to give notice within fifteen days after the death occurs, instead of within fifteen days after the happening of the injury, for the reason that as held in both of the cases above quoted from, it was impossible for the beneficiary to give such notice, including the particulars of the injury

and its result, as required by the policy, until after the death occurred.

In the case of McFarland v. U. S. Mut. Acc. Assn., 27 N. W. Rep. 436, the terms of the policy were somewhat different, but the principle involved was the same. There the policy required two notices to be given. The provision was as follows:

"In the event of any accidental injury for which claim may be made under this certificate, immediate notice shall be given in writing, addressed to the secretary of this association, at New York, stating the full name, occupation, and address of the member, with full particulars of the accident and injury, and also, in case of death resulting from such injury, immediate notice shall be given in like manner, and failure to give such immediate written notices shall invalidate all claim under this certificate."

There, as will be seen, a notice was first required of the accident, and an additional notice of the death. The accident happened in the early part of May, as the result of a fall by the insured from his wagon. On the morning of the 12th of July following, he was taken violently ill, and died at eleven o'clock that night. From the date of the accident until the death, no notice was given the association of the injury, though an assessment was paid by McFarland about the first of July. A few days after the death, the widow and beneficiary wrote to the association as follows:

"My husband is dead and buried. He has died from an accident caused by a fall. If you wish any further information, write and let me know, and I will inform you as far as I know."

The claim of the defendant in the action was that

"all claims for indemnity were forfeited by reason of not giving the association immediate notice of the accident and injury, and in not making direct and affirmative proof of the death within six months after the accident." The case is like the one at bar in that the injury did not cause disability at the time of its occurrence, and that fact is commented upon by the court in the opinion, and after reviewing the evidence showing that he continued in his usual occupation of teaming for the last two months of his life, the court say:

"There was no evidence of total disability, and no notice of the injury was required."

The case is precisely like this, in that the policy here does not cover any injury except such as causes disability, and no liability or obligation to give notice attaches until such injury has been received, and until the disability did occur, there was no obligation on the part of the insured to give any such notice. And in that case the court held that no notice was necessary within the time specified after the accident, and that the notice given by the beneficiary after the death was in time.

In Trippe v. Provident Fund Soc., 23 N. Y. Sup. 173, the certificate of membership provided that notice of any accident or injury must be given, with full particulars of the accident and injury, within ten days after the injury or death. In that case, the insured was killed by the falling of a building, and his body was not found or the cause of death discovered until after the time within which notice was required to be given. Notice was given eleven days after the accident, and eight days after the body was found. It was insisted

in that case, as in this, that the notice was not given in time. It was held that the notice was given in time, and that it was impossible to give the notice as required by the policy, giving full particulars of the injury or death, because the particulars were not discovered until after the time when the notice should have been given. There is no difference in principle between that case and this, although the terms of the policy are somewhat different. In both cases the policy required the notice given to include full particulars of the injury and its results, which could not be done in this case any more than in the other, under the allegations of the complaint showing that they had no means of knowing, and did not know, that the death or the serious illness of the insured was caused by the accident. It seems to us to be beyond question, under these authorities, that the notice in this case was given in time. If, however, the policy could be construed as requiring the insured to give the notice of the accident or injury during his lifetime, and that that was a condition affecting the right of the beneficiary to recover in case of death, which we deny, then the two excuses mentioned above, viz.: the fact that the injury was not one causing disability, and was not, therefore, covered by the policy, until a time within fifteen days of the giving of the notice, and therefore the notice given by the beneficiary was in time, and that the insured, within the fifteen days after the injury occurred, became insane, and continued so until his death, applies to the failure to give notice of the injury to him, and is a sufficient excuse for not giving the notice. In Insurance

Co. v. Boykin, 12 Wall. 433, in which the question of the right to recover upon a policy of fire insurance was involved, the Supreme Court of the United States said:

"Based on the facts of the case, the defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane, no such proof had been given, and if he were sane, then his affidavit showed such fraud as would defeat recovery. The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature, and amount of the loss. Second, *if he was so insane as to be incapable of making an intelligent statement, this would of itself excuse that condition of the policy.*"

So we submit that in any view that may be taken of the requirements of this policy and the acts of the plaintiff in error under it, the notice in this case was given in time, and that the Court below erred in holding to the contrary, and sustaining the demurrer to the plaintiff's complaint.

Respectfully submitted,

HUNTER & SUMMERFIELD,

WORKS, LEE & WORKS,

Counsel for Plaintiff in Error.

No. 818

IN THE

UNITED STATES

Circuit Court of Appeals

NINTH CIRCUIT

SOUTHERN DIVISION

ISSOLA RORICK,
Plaintiff in Error,

vs.

RAILWAY OFFICIALS AND EMPLOYEES ACCIDENT ASSOCIATION, A CORPORATION,
Defendant in Error.

Brief of Defendant in Error

GEO. E. OTIS,
Attorney for Defendant in Error.

F. W. GREGG, AND
HOWARD SURR,
Of Counsel.

Filed this __ day of May, 1902.

Clerk.

By

Deputy Clerk.

IN THE

United States Circuit Court of Appeals

Ninth Circuit, Southern Division.

ISSOLA RORICK,
Plaintiff in Error,
vs.
RAILWAY OFFICIALS AND EMPLOYEES ACCIDENT ASSOCIATION, A CORPORATION,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

In replying to brief of plaintiff in error in this case, we concede that *the question*, presented on this case is, whether notice given to the insurer, after the period specified in the policy here sued upon, had expired for giving such notice, is a valid notice. In other words, does the second amended complaint show, on its face, the existence of circumstances sufficient to excuse plaintiff in her failure to comply with the plain, clear and unambiguous terms of this policy, when such compliance was emphatically made a condition precedent to any recovery? In the words of counsel for plaintiff "this is

the question and the only question presented by this appeal."

Page 9 of Brief.

It appears from the second amended complaint that the accident, alleged to have caused the death of the insured, occurred either upon the 12th or 13th day of March, 1900; that he died on the 26th day of the same month, and that notice was sent to the defendant "within four days" after his death.

Record, p. 19.

The actual date of the mailing of the notice was the 30th day of March, 1900, and this was the date alleged in the original and also in the first amended complaint as the date of transmitting notice.

Following the well known rule that, on demurrer, a pleading must be taken most strongly against the pleader (Glyde vs. Dwyer, 83 Cal., 478; People vs. Wong Wang, 92 Cal., 281; Smith vs. Buttner, 90 Cal., 100), the second amended complaint must be taken to allege that notice was sent on the *fourth* day after the death of the insured, thus making the date of dispatching notice, to-wit: the 30th day of March, 1900, accord with the facts.

As a further answer to any question that might arise on this point, counsel for plaintiff in error, having so clearly stated in their brief (on page 9), the *one* question presented by this appeal, and having also, on their argument in the Court below, freely admitted that the said 30th day of March, 1900, was the actual date of the sending of the notice, we are justified in assuming that

plaintiff does not rely on any support for his contention, that the decision of the lower Court should be reversed, from any construction which may be put upon the allegation, contained in the second amended complaint, as to the date of sending notice, but admits the fact that no notice was sent to the defendant until after fifteen days from the date of the accident causing the death of insured, had expired.

The obtaining of a reversal of the judgment of the lower Court, based purely on such technical grounds, without at the same time deciding the real point at issue in this controversy, would, even from the point of view of the plaintiff in error, be but an unsatisfactory achievement, and might be described, like the victory of Pyrrhus of old, as a "victory worse than a defeat."

Far better never to have essayed the labor and expense of a review of the judgment in this case, by this Court, if after such review, plaintiff may still be confronted with the question whether or not notice to insurer was given in time by the plaintiff.

The demurrers to the original complaint and the first amended complaint were sustained for the same reason that the demurrer was sustained to the second amended complaint, viz: failure to show that notice has been given to the insurer within fifteen days from date of accident.

Before proceeding to examine the argument of counsel for plaintiff, it might be well to notice some of the terms of the policy, which is the foundation of this suit.

It would seem that the following extracts from this

policy, form an impregnable barrier to any attacks which plaintiff may make upon the position of the defendant in this case, and we respectfully submit, are entirely conclusive upon the question now before this Court:

"Notice of the accident causing the disability or death shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the *accident*, causing the disability or death, stating the name, occupation, and address of the insured, with date and full particulars of the accident causing the disability or death, and causes thereof; and failure to give such notice within said time, shall render void all claims under this policy."

From page 13 of record.

"All the terms and conditions of this contract are *conditions precedent*."

Record, page 15.

From the above quotations from the policy, it will be seen:

First. That notice of the *accident* causing the disability or death, and not notice of the disability or death, must be given within fifteen days from the occurrence of such accident.

Second. That this giving of notice is not confined to, or must necessarily be performed by, any specified person.

Third. That the notice must give particulars of the causes of the accident, and particulars of the causes of the disability or death are not required to be given.

These three points are the main characteristics which distinguish this case, and differentiate it from the cases where circumstances somewhat similar to those existing in the case at bar have been present, but, owing to different wording of the policy in those cases, these precise features have been absent, and many such cases have been cited in brief of plaintiff in error.

Upon examination of the argument presented by our adversaries, it will be observed that they endeavor to establish, by pursuing a course of reasoning, more plausible than logical, the somewhat startling doctrine that the party to such a contract, as the policy under consideration here, is not bound to strictly follow the conditions, which he has voluntarily, while in full possession of his faculties, imposed upon himself.

The whole theory of this argument seems based upon the idea that what the insured is bound to do under such a policy is commensurate with, and is to be entirely controlled by, what the insured, or somebody else, *thinks* the result will be of any accident he may meet with. Such a conception of the proper way to interpret such a policy as this, would inevitably lead to the logical conclusion that it is absolutely useless and hopeless for any Accident Insurance Company to attempt, in any way, to bind a policy holder to give notice, within a certain time, of an injury which the insured may receive. If such be the correct construction of the notice clause of this policy, which speaks with no uncertain sound on this point, and is, we maintain, expressed in language which it would be impossible to make more lucid, or

less free from ambiguity, all insurance companies of this class are immediately placed at the mercy of every imaginable species of fraud and imposture. Upon the death of an insured person, what would prevent the assertion of a claim that death was due to an accident, happening at a date long prior to the death of the insured, and the evidence of the circumstances, causes and consequences of the accident, in such a case, it would, in nine cases out of ten, be impossible for the insurance company either to prove or gainsay.

This is only one phase of what might be encountered by endorsing the shadowy hypothesis of the plaintiff in error, and leaving the domain of clearly defined contractual obligations and rights for the murky realm of strained construction and twisted interpretation.

Once permit the winds of legal ideas to blow where they list, and depart from limits well defined and circumscribed by contract, and we are thereupon confronted with more innumerable vexatious problems than ever arose from the fabled box of Pandora.

We concede with counsel for plaintiff in error that the question under consideration "must be determined by the terms of the policy taken as a whole;" but we protest against the claim of thus construing the policy "as a whole" when one of the vital portions of the policy, viz: the clause regarding notice is either practically ignored by counsel, or its language interpreted to mean something entirely different from the plain language used by both parties to the contract.

On pages 11 and 12 of brief of plaintiff in error,

much stress is laid upon the supposition of counsel that there must be a mutuality of obligations existing between insurer and insured, in regard to this question of giving notice, and it is maintained, quite seriously apparently, that the compliance with what the respective parties to the contract have expressly agreed upon as a condition precedent to any recovery, under the policy, may be afterwards left to the dictates of the person insured.

It is not easy to see upon what this idea of the necessity of mutuality is based, or upon what foundation it can possibly rest for any legal support, or how it can be seriously suggested to have any application here.

This policy is simply a conditional offer to pay the insured or his beneficiary a certain sum of money upon his complying with its terms.

There is no violation of any contract if the insured simply fails to give notice to the insurer; he is not bound to give any notice at all, providing he does not wish to follow the terms of the policy, and in that event, of course, he forfeits all claim under the policy, but neither of the parties is bound until the insured fixes the obligation of the insurer by giving proper notice, and consequently mutuality of obligations does not arise until then, and therefore, we submit, the very substance of our opponent's argument upon this point of mutuality is "merely the shadow of a dream."

The three alleged excuses for not giving notice within the time prescribed by the policy, appearing on page 12 of brief of plaintiff in error, are all based on the plain mis-

apprehension of the terms of the policy, that we have mentioned before, viz., that the time of giving notice commences to run from the date of the death or disability of the insured, and not, as the policy so clearly prescribes, from the date of the *accident* causing such death or disability.

The first case cited in brief of plaintiff in error is the case of Phillips vs. U. S. Ben. Soc., 79 N. W. Rep., 1.

A careful reading of this case will show that there is very little resemblance between that case and the one at bar.

The complaint in the case at bar alleges that the cause of the death of the insured was discovered immediately after his death, which occurred within the period specified for giving notice of accident; yet, in spite of this fact, no notice was given to the defendant until some time after the fifteen days allowed for giving notice had passed.

There is no mistake of any physician alleged here, regarding the cause of *death*, the allegation regarding the mistake of Daniel Rorick's physician being limited to the cause of the sickness of the insured.

It is also noticable in the Phillips case that the duty of the insured to give notice arose merely from a by-law of the Insurance Society, and the obligation was not so stringent as the requirement of the notice demanded in the case at law, where the stipulation was inserted in the policy itself, and emphatically made a condition precedent to any recovery under the policy.

The next case cited in brief of plaintiff in error is

Odd Fellows' Frat. Acc. Assn. vs. Earl, 70 Fed. Rep., 16. The provisions for giving notice in this case were as follows:

"Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim of indemnity or benefit is made, with full particulars thereof, including a statement of the time, place, and cause of the accident, *the nature of the injury*, and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

It will be seen that this clause for giving notice contains a requirement not included in the notice clause, contained in the policy, under consideration, in the case at bar. This requirement is, that the notice given, shall include a statement of "the nature of the injury," in addition to particulars, regarding the accident causing such injury. Of course, if any injury had not occurred, it would be manifestly impossible to send notice describing the nature of it. This fact is commented on by the Court. In the case at bar simple notice of the *accident*, and the causes thereof, is required, and it is quite possible, and we contend it is the only prudent course for a holder of such a policy, to give notice to the insurer, whether from such accident either disabilty or death has resulted at the time of sending the notice or not.

For example, a case might occur where the insured met with a fall, yet might, at the time of the accident,

be quite ignorant of the nature of the injury sustained by such fall. It might not at the time, as is sometimes the case where an internal injury results, be possible to give a statement of the "nature of the injury," but the want of knowledge of the result of the accident would not prevent giving details of the accident itself.

Counsel for plaintiff in error seem to lay great emphasis upon the words that the accident of which notice is to be given, in the case at bar, is the accident "causing the disability or death," and argue from these words that disability or death must have resulted within fifteen days before notice need be sent. This theory might be tenable if the clause in question was "notice of the accident, causing the disability of death *within fifteen days* shall be given, etc.," but there is no such qualification existing here in the policy, and regardless of this view of the question, as the accident the insured met with is alleged to have occured *between* the 11th and 14th of March, 1900, it must have either occurred on the 12th or 13th of this month, and hence, construing the allegation by the rule hereinbefore referred to, we must take it that the accident occurred on the 13th of March, and, as his death occurred on March 26th, the case at bar falls within the class mentioned in the opinion of the Odd F. F. A. Association case, *supra*, when the court says:

"The notice here called for is plainly to be given when a claim for indemnity by the certificate holder, or of benefit by the beneficiary, is extant. If the incapacity, contemporaneous in origin with the date of the

accident, has resulted, or if the mutilation or death has taken place, within ten days, so that a claim for indemnity or benefit is outstanding, *the ten days' notice seems to be required.*"

This being so, it is clear that the facts which existed in the Odd F. F. A. Association case were entirely different from the state of facts present in the case at bar, and we think counsel for plaintiff in error have quoted "not wisely but too well" in making extracts from such a case. Part of the opinion quoted above (and also in brief of plaintiff in error, page 18,) directly supports our contention and shows clearly what the Circuit Court of Appeals of the Seventh Circuit consider the law to be where death occurs, as in the case at bar, within the terms specified for giving notice, as the Court distinctly says:

"If the mutilation or death has taken place within the ten days, so that a claim for indemnity or benefit is outstanding, the *ten days' notice seems to be required.*"

The next case cited by counsel for plaintiff in error, (on page 19 of brief), is that of Hoffman vs. Accident Indemnity Co., 56 Mo. Appeals, 301, and it is blandly stated that it "is directly in point," and that "the notice in that case was similar in all respects to the one at bar."

To maintain this assertion, counsel follows it by setting out the requirements of the notice clause in that case, and the suicidal nature of this step is at once apparent for the notice is plainly *felo de se*, and proves too much.

We quote from their brief, page 19:

"In the event of an accident or injury for which or from which, directly or indirectly, any claim may be made under this certificate, either for weekly indemnity or loss of limbs or loss of both eyes or for the death benefit, immediate notice shall be given in writing, signed by the member or his attending physician, or in case of death, *by the beneficiary*, addressed to the secretary of the company at Geneva, N. Y., stating the full particulars as to when, where and how it occurred, and the occupation of the member at the time, and his address, and the failure to give such immediate notice mailed within ten days of the happening of such accident, shall invalidate all claim under this certificate."

The great distinguishing characteristic between the notice clause here quoted, and that of the policy in the case at bar is that, in the former, notice of the accident causing the death, is to be given in case of death, *by the beneficiary*, within ten days of the happening of such accident.

Such a requirement is absurd on its face, as the beneficiary would not be entitled to give notice of the accident while the insured still lived, as the right of the beneficiary to give such notice only arises by virtue of, and is limited by the words, "in case of death, by the beneficiary;" so in the event of death happening after the ten days allowed for notice, had expired, the beneficiary would be, under such an unreasonable clause, unable to give notice, within the required ten days, of the occurrence of accident which caused the death, and also

would be precluded while the insured lived from giving notice.

It will be noticed that the right of giving notice of the accident causing death is not limited by the policy, in the case at bar, to any person whatever. This being the case, where is the shadow of a vestige of resemblance between the two cases? On this ground alone the feebleness of the argument that the two cases are alike is patent, and the whole contention of counsel, on this point, must fall when its fictitious foundation is seen.

This distinction, regarding the ability of a beneficiary to give notice at any time, either before or after death, under such a policy as the one which is the ground of the present controversy, seems to have been entirely lost sight of by counsel for plaintiff in error, as they repeatedly imply in their brief that plaintiff in error was not called upon to give notice of the accident until death of the insured occurred.

See page 15, brief.

The next case commented upon by the brief of plaintiff in error, is that of McFarland vs. U. S. Mut. Acc. Assn., 27 S. W. Rep., 436 (Mo.) That was a case where the insured was insured against total disability and death. The notice in the policy was as follows:

"In the event of any accidental injury for which claim may be made upon this certificate, immediate notice shall be given in writing, addressed to the secretary of this association, at New York, stating the full name, occupation, and address of the member, with full partic-

ulars of the accident and injury, and also, in case of death resulting from such injury, immediate notice shall be given in like manner, and failure to give such immediate written notices shall invalidate all claim under this certificate."

From page 21 of brief.

The insured met with an accident which produced *no disability*, but the insured subsequently died from the effects of the accident, and the Court held that though a double notice was demanded by the policy, when the injury caused both disability and death, yet in the absence of such disability, notice of death alone would be sufficient to prevent rights of the beneficiary from being forfeited. The Court said:

"In case of severe injury resulting in immediate total disablity, and which after a lapse of days or weeks, results in injury and death, the conditions which require notice to be given of both the injury and death are clearly expressed. These are made conditions precedent, and a failure to perform them in a reasonable time and manner would invalidate all claim to the indemnity. Insurance Co. vs. Kyle, 11 Mo., 289; McCullough vs. Insurance Co., 113 Mo., 606, 21 S. W., 207."

"It is evident that the association failed to provide expressly for giving notice of the injury in such a case as this, in which total disability was not caused. An accident happened which resulted in death, and created a claim for a death loss, but not for such a disability loss as is contemplated under the contract."

"To require that notice be given immediately after an accident and injury which does not result in total disability, is requiring something not contained in the contract."

The Court then goes on to construe what the word "immediately" means in the notice clause and decides that in some cases it may be held to mean "a reasonable time."

It will be seen that this case differs materially from the case at bar, as in the latter case there is no clause susceptible of such elastic interpretation. but a certain number of days are allowed within which to give notice. If it is permissible to give notice two days after such period has expired, why should it not also be held that a notice given twenty days after the expiration of the period is equally binding on the insurer. Such difference is only one of degree not of kind.

In spite of the palpable distinction existing between the McFarland case and the case at bar, counsel for plaintiff in error insist (on page 22, their brief), that the two cases are very similar.

We deny this. In the case at bar there is no question raised as in the McFarland case, as to whether the insured should have given notice of any disability which resulted from the accident he met with, and the policy here does not call for the double notice prescribed in the McFarland case.

From the first quotation, we have made from the opinion in the McFarland case, it is very plain that the Court never intended to imply that when, as in the case

at bar, the insured was injured and died *within* the period limited for giving notice, that in such event, notice need not necessarily be given in accordance with the policy's terms.

Here it appears, that David Rorick was injured on March 13th, 1900, and died on March 26th, 1900; yet no notice was sent until the 30th day of March, 1900.

The question what would have been the effect on the rights of the beneficiary had Rorick died after the expiration of the fifteen days, allowed for giving notice, does not arise here at all, and whatever view is taken upon that subject, is entirely irrelevant to the case now before this Court.

We therefore submit that, as the claim of plaintiff in error was outstanding before fifteen days from date of the accident, alleged to have caused death of insured, had passed, the McFarland case cannot be held to be in the slightest degree parallel to the case at bar and such extracts from the former case, relating to notice of disability, made by counsel for plaintiff in error, tend rather to obscure than throw light upon the present question.

The case of Trippe vs. Provident Fund Society, 23 N. Y. Sup., 175, is another case cited by plaintiff in error, and they say:

"There is no difference in principle between that case and this, although the terms of the policy are somewhat different. In both cases the policy required the notice given to include full particulars of the injury *and its results*, which could not be done in this case any more than in the other."

It would be hard to understand why this case should be cited from the point of view of the counsel for plaintiff in error, except upon the ground of the misappresion of counsel as to the kind of notice of the accident required in case at bar. In the garbled version of the sort of notice demanded here, counsel contend that the policy in case at bar "required the notice given to include full particulars of the injury and its results." (See brief, page 23.) A cursory glance at the notice clause in this policy will show that this is incorrect, as only particulars of the *accident* are required and not particulars of the resulting disability or death.

The case of Trippe vs. Provident Fund Society, *supra*, it will be observed at a glance is not analogous to the case at bar. In the former case the notice clause provided that written notice had to be given "within ten days from the date of either injury *or death.*"

The body of Trippe was buried in the debris of a building, which had fallen, and no one knew that he had been killed or injured until the body was recovered It was held very properly that upon these facts neither the occurrence of the injury or death being known, notice of either could not be given until knowledge of the event was obtained by the recovery of the body.

If David Rorick had disappeared under similar conditions, the Trippe case might be compared with considerable force to the case at bar, but where the insured, as in the case at bar, dies under no such peculiar circumstances, and dies within the time limit for giving notice, we fail to see the analogy which counsel for plaintiff in

error maintain is presented by the two cases. There is no doubt the court in the Trippe case would have decided that case very differently had such facts as exist in the case at bar existed in the former case, and we quote from the opinion in the Trippe case, on page 175 of 23rd N. Y. Sup.: "*It is no doubt settled law* that when the time within which notice of the injury or death must be given, is specified definitely, *it must be complid with or no recovory can be had.* Striking examples of this rule will be found in Gamble vs. Accident Co., 4 Ir. Com. Law, 204, and Patton vs. Corporation, 20 L. R. Ir., 93, wherein it was held that the omission to give the notice within the prescribed time, even when death was instantaneously caused by an accident, was a complete answer to any claim made on the policy. Those were cases of accidental drowning, and *are distinguishable from the present by the important feature that the fact of death was known immediately following the accident.*"

To attempt to make the distinction between the two cases clearer, after the last quotation, would be "wasteful and ridiculous excess."

The last case mentioned in brief of plaintiff in error is that of Insurance Company vs. Boykin, 12 Wall., 433, were it was held that insanity would be a valid excuse for giving notice. This is not the point at issue here, as the question in the case at bar is whether the plaintiff has forfeited *her* rights by not complying with the terms of the policy, and we are not arguing the question as to whether the insured forfeited *his* rights by being prevented from giving notice of the accident

causing his alleged disability. In the case cited it will be observed that notice required by the policy was given. If the insured in the case at bar had punctiliously carried out every obligation laid on him by the policy, this fact would not mitigate or tend in any way to excuse the failure of plaintiff to comply with conditions, the fulfillment of which might be made incumbent upon her, by the policy, before any liability of the Insurance Company would arise, and we strenuously insist that under such provisions as are contained in the policy in the case at bar,

It is imperative that notice must be given in accordance with the terms of the policy, in the absence of a waiver, or unless some superhuman cause has prevented compliance with such stipulation.

In the case of McCormack vs. N. British Ins. Co., 78 Cal., 469, the policy contained the usual condition as to making preliminary proof of loss, and provided that the amount to be paid under the policy should be paid "sixty days after the proofs shall have been made by the assured."

The learned counsel for plaintiff in error, Judge Works, wrote the opinion in that case and said:

"Where such preliminary proof is required by the policy, the assured must allege and prove that the proof has been made or that the requirement has been waived. (Doyle vs. Phoenix Ins. Co., 44 Cal., 264; May on Insurance, Sec. 465.)

There was no evidence that the necessary proof had been given, nor was it shown that such proof had been waived.

The nonsuit was therefore properly granted.

Judgment affirmed."

It is almost superfluous to remark that no waiver is alleged in the complaint in the case at bar, nor does the complaint contain any allegation of notice having been given in time.

In the case of Heywood vs. Maine Mut. Acc. Association (Maine), 27 Atlantic Rep., 154, the plaintiff sought to recover on an accident policy for injuries received. The policy contained stipulation that failure to give notice to the company within ten days of the occurrence of the accident should invalidate all claims under the policy. The case is on all fours with the case at bar, and the language of the opinion is as follows: "The policy contained a stipulation that failure to notify the company of the injury for ten days after it occurred should bar all claim therefor. It was competent for the parties to make the agreement, and they are bound by it. The plaintiff neglected to notify the company of any accident or injury to himself until twenty-six days had elapsed. A careful examination of the evidence shows no waiver on the part of the company. The authorities cited at the bar conclusively show that plaintiff cannot recover. According to stipulation of the parties, judgment for defendant."

In the case of Gamble vs. Acc. Ins. C., 4 Ir. C. L., 204, the insurance policy sued upon made it a condition

precedent to recovery that notice, together with full particulars, should be given within seven days of the death of the insured. Owing to the fact that the accident was a sudden one and produced instantaneous death, no one gave the notice required as no one was aware of the existence of the policy. The court held that a failure to give the notice required would prevent a recovery, as the failure was not due to the act of God, and the insured ought to have provided for such a contingency and informed some one of the existence of the policy.

This doctrine is indorsed by that very accurate writer Joyce in his work on Insurance. He says:

"Life policies generally require that notice and proofs of death be furnished within a certain time after the death of the insured, and stipulate forfeiture in case of noncompliance. If the policy specifies the time within which such conditions must be complied with, with the proviso that all rights under the policy shall be forfeited in case of noncompliance, *then no recovery can be had except the requirements of the policy be fulfilled*, and it is held that only an act of God will excuse."

Joyce on Insurance, Sec. 3277, citing Patton vs. Emp. etc. Association, 20 L. R. Ir., 93, and Home Ins. C. vs. Lindsay, 26 Ohio, 348.

"If the policy provides that in case of the death of the insured notice must be given to the company within a certain specified time thereafter, and makes the requirement a condition precedent to recovery, *notice must be given within the time specified*, otherwise there can be

no recovery, except there has been a waiver of the provision, or unless the act of God has prevented compliance with the provision."

Joyce on Ins , Sec 3278.

"Where the policy provides that notice must be given and proofs of loss furnished within a certain prescribed time, and that failure to comply with this provision shall constitute a bar to an action upon the policy, *the condition is a valid and binding one, and if such stipulation has neither been complied with nor waived, there can be no recovery.*"

Joyce on Ins., Sec. 3280.

See also Joyce on Ins., Sec. 3281.

The opinion in the case of West Travellers Ass'n. vs. Smith, 85 Fed., 402, which was a decision by the Circuit Court of Appeals, for the Eighth Circuit, of the United States, contains language which is precisely in point on the question presented by the case at bar.

The policy there sued on, contained the stipulation that "in the event of any accident or injury for which any claim shall be made under this certificate, *or in case of death*, resulting therefrom, immediate notice shall be given."

It will be readily seen that this clause differs widely from the clause regarding notice, in the case at bar, as the notice there exacted was *either* of the accident *or* of the death resulting therefrom. There is no such alternative provided in the policy in the case at bar, as here the "notice of the *accident* causing the disability or death shall be given."

The insured in the case of West Com. Trav. Ass'n., *supra*, failed to give the required notice of the injury which resulted in his death, but the beneficiary gave notice of the death, within a reasonable time thereafter, which, under the alternative course provided in the notice clause, was held sufficient, and the Court said: "Must she give notice of the accident on account of which her claim may rise before she knows whether or not it will ever come into existence? A provision which exacts such a notice should be plain, clear and unambiguous. * * * * * *A stipulation could have easily been drawn which would have plainly imposed upon this beneficiary the duty of giving such a notice.* If this contract had simply omitted the words, 'or in case of death resulting therefrom,' and had provided that 'in the event of any accident or injury for which any claim shall be made under this certificate, notice of such accident or injury shall be given, immediately after it happens,' there *would have been no doubt that the beneficiary was required to notify the association of the accident as soon as it occurred.* * * * If this is not the correct construction of the provision, the words 'or in case of death resulting therefrom,' are without significance or effect, because the stipulation, *without those words*, would require the beneficiary of a death loss to give notice of the accident or injury immediately after it occurred."

The case at bar is precisely the same as the hypothetical case suggested in the above opinion, as "a plain, clear and unambiguous" stipulation, was inserted in the

Rorick policy to the same effect as the clause mentioned in the above opinion, without the qualification, which proved so fatal to the insurer, contained in the policy in that case.

For other authorities regarding doctrine of construing limitations in policies, requiring the giving notice or furnishing proofs, as conditions precedent within the allotted time, see cases of:

White vs. Home Mutual Ins. Co., 128 Cal., 135.

Prudential Ins. Co. vs. Myers, 15 Ind. App., 339.

Blakely vs. Phœnix Ins. Co., 20 Wisconsin, 206 and 91 Am. Dec., 388.

Gould vs. Dwelling House Ins. Co. (Michigan), 51 N. W. Rep., 455.

McCullough vs. Phœnix Ins. Co., 113 Mo., 606, and 21 S. W. Rep., 208.

Williams vs. Pref. Mut. Acc. Ass'n., 91 Ga., 698 and 17 S. E., 982.

Trask vs. State F. & M. Ins. Co., 29 Pa., 198, and 72 Am. Dec., 622

Quinlan vs. Prov. Wash. Ins. Co., 133 N. Y., 362.

Knudson vs. Hekla Ins. Co., 75 Wis., 198, and 43 N. W. Rep., 954.

Inman vs. West F. Ins. Co., 12 Wend., 459.

Barre vs. Council Bluffs Ins. Co. (Ia.), 41 N. W. Rep., 373.

Shapiro vs. West Home Ins. Co. (Min.), 53 N. W Rep., 463.

Sergent vs. London and Liverpool & G. Ins. Co., 32 N. Y. Sup., 594.

Germ. Ins. Co. vs. Fairbank, 49 N. W. Rep., 711.
West Home Ins. Co. vs. Richardson, 58 N. W. Rep., 597.
Cawley vs. Nat'l. Emp. Assn., 1 C. & E., 597.

Though the question here does not arise in that case, we would also refer to the recent case of Northern Assurance Co. vs. Grand View Bld. Assn., decided at the October term, 1901, of the Supreme Court of the United States, when the question of construing insurance policies strictly is gone into at some length.

It is of great importance to all insurance companies that speedy notice be given to them of an accident, so that while the accident is fresh they can examine the witnesses of the occurrence, and ascertain whether they are liable or not, and fifteen days is an ample period of time within which to give such notice. On the other hand, if no notice at all is required, then within four years after the accident has occurred an action could be brought upon the policy of insurance, and the insurance company could be mulcted in heavy damages in cases where either no accident at all ever occurred, or where proof could not be available for the insurance company to defeat the action by reason of lapse of time. These policies, therefore, should be construed according to their terms, and, as the New York *Independent* in a late editorial, the date of which we have forgotten, urges, it is of great importance for the administration of insurance companies, and for the protection of honest claimants, that insurance companies should be protected from judgments unless they are liable under the terms

of their policies. Here the plaintiff thought the accident was a trivial one. She knew of it, but made a mistake as to its gravity. Such mistake does not excuse the not giving the notice required. If the fact that Mr. and Mrs. Rorick through mistake deemed the accident a trivial one, should excuse their not giving the notice, or the fact of the physicians having made a wrong diagnosis of the injury, and thereby induced them to make a mistake ; if such reasons can justify or excuse in any way the failure to give notice, then are the terms of insurance policies not the strong covenants which they should be, but mere bonds of sand.

The plaintiff admits that she knew of the accident from the time that it occurred, but attempts to excuse the not giving the notice on the grounds of her alleged belief in the trivialty of the accident, the mistaken diagnosis of the physician, and the insanity of the deceased coming on a few days before his death. The fact still remains very clearly and prominently, that she might have given the notice, if she thought it worth while so to do, within the alloted time, and even after Mr. Rorick's death, and the instrument of contract upon which she seeks recovery imperatively demands a giving of the notice as a condition precedent to any recovery. How then, can she recover unless courts refuse to be governed by the contract of insurance, which, carried out in all of its requirements will yield the best results to the honest assured?

It must be assumed that the insured entered into this contract with his eyes wide open and in full possession

of his faculties, and the language of this clause, whichever way it is taken, leaves no loophole by which it is possible to escape from the necessity of giving notice of the accident causing the death within fifteen days from the date of such accident, in the absence of impossibility of performance or waiver.

Counsel for plaintiff in error intimate in their brief that the learned judge of the Court below was swayed by conscientious scruples, against permitting any considerations of sympathy for the plaintift in error to affect his judgment, to such an extent that he has allowed such feelings to carry his determination of the question beyond the point where it can be supported by authority.

This suggestion cannot be maintained, and it is only necessary to read the opinion of the learned judge (Record, p. 27), to see how his views upon the question before this Court, harmonize with the authorities, and, we respectfully submit, that his decision, instead of manifesting the presence of any element of anti-sympathetic bias, is simply an illustration of deciding a controversy by the "dry light of reason."

The contract was voluntarily entered into by the insured, and the notice clause was entirely a reasonable one, and no element of hardship is present.

Were this not the case, it would seem very unconscionable to restrain a person of mature age, in full possession of his senses, who is a member of a community which makes the slightest claim to the enjoyment of freedom, from becoming at his own volition a party to any contract, merely because the terms of such contract

savored of hardship, and after having made such a contract, if any inconvenience or loss to either party arises therefrom, from not complying with its terms, it would not be equitable, after making all sympathetic allowances, to say that performance is excused, on these grounds alone

We have not found a single case which presented similar facts as those existing in the case at bar, (nor have counsel for plaintiff in error referred to such a case), where it was held that the insured could recover, and we respectfully submit to establish such a precedent would revolutionize the application of the law to accident insurance; and we contend that the hypothesis of counsel for plaintiff in error is altogether a too tenuous ground on which to found the right to transfer the sum of $5,000 from the possession of the defendant to the pocket of the plaintiff in error.

It is respectfully submitted that the judgment of the Court below should be affirmed.

GEO. E. OTIS,

Attorney for Defendant in Error.

F. W. GREGG, AND

HOWARD SURR,

Of Counsel.

No. 819

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

CHARLES NELSON, Claimant of the Steam Schooner "LAKME,"

Appellant,

vs.

THE QUEEN ELIZABETH COMPANY, LIMITED (a Corporation), Claimant of the British Ship "QUEEN ELIZABETH," and the PUGET SOUND TUGBOAT COMPANY (a Corporation), Claimant of the Steam Tug "TYEE,"

Appellees.

VOL. I.

(Pages 1 to 352, inclusive.)

Upon Appeal from the United States District Court for the District of Washington, Northern Division.

The Filmer Brothers Co. Print, 424 Sansome St., S. F.

INDEX.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

Consolidated Causes.

QUEEN ELIZABETH COMPANY, LIMITED,
Libelant,
vs.
STEAM SCHOONER "LAKME,"
Respondent.
CHARLES NELSON,
Claimant.
} No. 1708.

CHARLES NELSON,
Libelant,
vs.
The British Ship, "Queen ELIZABETH," and the Steam Tug "TYEE,"
Respondents.
THE PUGET SOUND TUG BOAT COMPANY,
Claimant.
THE QUEEN ELIZABETH COMPANY, LIMITED,
Claimant.
} No. 1710.

Statement.

Time of Commencement of Suits.

Cause No. 1708: May 16, 1900.

Cause No. 1710: May 25, 1900.

Names of Parties to Suits.

Cause No. 1708.

Libelant: Queen Elizabeth Company, Limited, a British corporation.

Respondent: The American steamship "Lakme," her boilers, engines, tackle, apparel and furniture.

Claimant: Charles Nelson.

Cause No. 1710.

Libelant: Charles Nelson.

Respondents: British Ship "Queen Elizabeth" and the steam tug "Tyee."

Claimants: Queen Elizabeth Company, Limited, a British corporation, and Puget Sound Tugboat Company.

Dates of the Filing of Pleadings.

Cause No. 1708.

Libel, filed May 16, 1900.

Answer of claimant Charles Nelson, filed May 26, 1900.

Cause No. 1710.

Libel filed May 25, 1900.

Answer of claimant Queen Elizabeth Company, Ltd., filed June 2, 1900.

Answer of claimant Puget Sound Tugboat Company, filed Oct. 17, 1900.

Attachment of Property, and Proceedings Thereunder.

Cause No. 1708.

Respondent steamship "Lakme," was attached and taken into custody by the United States marshal for the District of Washington, under monition and attachment

issued in said cause, on the 16th day of May, 1900, and was thereafter released by said marshal on the 17th day of May, 1900, upon the filing, by claimant Charles Nelson, in the office of the clerk of said court, of his claim for said respondent steamship, together with stipulation for costs, and bond for the release of said steamship, then duly approved.

On May 26, 1900, on application of claimant Charles Nelson, an order was made by the Court directing the issuance of monition and attachment against steam tug "Tyee," upon the filing by said claimant of stipulation for costs in the sum of $250. Thereafter and on said 26th day of May, 1900, such stipulation for costs having been duly filed, monition and attachment was issued against said steam tug "Tyee," and said vessel was on June 13, 1900, taken into custody by the United States marshal for the District of Washington under said monition. Thereafter, and on said June 13, 1900, said steam tug "Tyee" was released by said marshal, upon the filing, by claimant Puget Sound Tugboat Company, in the consolidated causes, of its claim therefor, together with stipulation for costs, and bond for the release of said steam tug "Tyee," duly approved.

Cause No. 1710.

Respondent ship "Queen Elizabeth" was attached and taken into custody by the United States marshal for the District of Washington, under monition and attachment issued in said cause, on the 25th day of May, 1900, and was thereafter and on the 2d day of June, 1900, released by said marshal, upon the filing, by claimant Queen Eliz-

abeth Company, Limited, in the office of the clerk of said Court, of its claim for said respondent ship, together with stipulation for costs, and bond for the release of said respondent ship, then duly approved.

Trial.

On November 25, 1901, said causes Nos. 1708 and 1710, consolidated, were tried in the United States District Court, for the District of Washington, Northern Division, at Seattle, Washington, before the Honorable C. H. Hanford, Judge of said court.

Final Decree.

The final decree was made and entered in said consolidated causes on February 5, 1902.

Notice of Appeal.

The notice of appeal in said consolidated causes was filed therein by said claimant and appellant, Charles Nelson, on March 31, 1902.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED (a British Corporation),
Libelant,

vs.

The American Steamship "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent.

No. 1708.

Libel in Rem.

To the Honorable CORNELIUS H. HANFORD, Judge of the Above-entitled Court:

The libel of the Queen Elizabeth Company, Limited, a British corporation, sole owner of the British ship "Queen Elizabeth," against the American steamship "Lakme," her boilers, engines, tackle, apparel and furniture, whereof one Schage is or lately was master, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime, alleges as follows:

I.

That your libelant, before and at the time of the collision hereinafter referred to, was, since has been and is

now a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and prior to the times hereinafter mentioned was, since has been and now is the sole owner and proprietor of a certain British ship called the "Queen Elizabeth," her tackle, apparel and furniture, which ship, at the time of the collision hereinafter referred to, was on a voyage from Shanghai, in China, via Port Townsend, in Washington, to Port Blakeley, Washington, under charter for a cargo of lumber.

That on Friday, the 13th day of April, A. D. 1900, at the port of Port Townsend aforesaid, the master of said ship "Queen Elizabeth" engaged the tugboat "Tyee," a tugboat operating on Puget Sound, to tow the said vessel from Port Townsend, in the District of Washington, to Port Blakeley aforesaid, in said District; and thereupon, at Port Townsend aforesaid, on the day last named, the said tugboat "Tyee" entered upon the performance of such service, made fast to said vessel, and proceeded to tow her from Port Townsend aforesaid to Port Blakeley aforesaid.

II.

That on the morning of Saturday, April 14th, 1900, at about four o'clock A. M., while en route from Port Townsend aforesaid to Port Blakeley aforesaid, the said tugboat "Tyee" was off Point No Point, on Puget Sound, with said ship in tow. That said ship was at said time staunch, tight, and strong, well manned, victualed, equipped and appareled, and sound in every respect, fit to perform her then intended voyage, and her master and

crew were on the lookout for the protection and safety of said vessel, and that she had at that time her lights in place and burning brightly, and at the same time and place the said tugboat was also well equipped, had in place and burning brightly her lights, and was duly performing its service. That just as the ship in tow, as aforesaid, passed Point No Point, aforesaid, bound south for Port Blakeley, at the hour aforesaid, the American Steamship "Lakme" came in sight, proceeding north and in the opposite direction from said tugboat and her said tow. That at that time the said tugboat and her tow and the said steamship "Lakme" were distant about one and one-half miles from the western shore of Puget Sound, and the eastern shore of Puget Sound was distant about two and one-half miles. That when the said steamship was so approaching said tugboat and distant from her about three miles, said tugboat gave two blasts of her whistle to indicate that she would pass to starboard with her tow, and thereupon the said steamship, having the said tugboat and the said ship "Queen Elizabeth" in full view, and seeing their lights, answered the said signal of said tugboat with two blasts of her whistle, indicating that she, the said steamship, would pass to starboard. Thereupon the said tugboat duly altered her course so as to pass to starboard, and at the same time the master of the ship "Queen Elizabeth" duly altered her course so as to follow the said tugboat and pass to starboard; but the said steamship "Lakme" failed to alter her course to starboard, but altered the same to port, so that instead of passing to the starboard the said

steamship come directly to and upon the said ship "Queen Elizabeth," striking her a glancing blow on her port bow, staving in her plates, carrying away her headgear, staving in the forecastle rails, carrying away the fish davit, fouling the starboard anchor, and otherwise injuring the said ship, so as to damage said ship in the sum of $8,374.00.

That the said ship "Queen Elizabeth" was under a time charter as aforesaid, whereby it was stipulated that for each day's delay in procuring her cargo and proceeding to her port of destination, Port Iquiqui, Chili, she should pay the sum of $102 per day, and she has been delayed in making repairs on account of the damages aforesaid the full period of thirteen (13) days, to the damage of the libelant in the sum of $1,320, and during the same period of delay the libelant has been put to loss on account of the expenses of master and crew in the sum of $300.

III.

That said collision was in no way caused by the fault or negligence of the said ship "Queen Elizabeth" or those on board of her, nor was it caused in any way by the fault or negligence of the tugboat or those on board of her, but was solely due to the carelessness and negligence of those in charge of the steamship "Lakme," in that being a steam vessel, she did not avoid the ship "Queen Elizabeth," which was a sailing vessel, and in that the steamship was improperly managed and navigated, and was in other respects negligent in the premises, which will be shown on the trial of this suit.

IV.

That the said steamship is now within the District of

Washington, and within the jurisdicton of ths Honorable Court.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that the process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamship "Lakme," her boilers, engines, tackle, apparel and furniture, and that all persons having any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the damages as aforesaid, and that said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

PRESTON, CARR & GILMAN,
Proctors for Libelant.

United States of America,
District of Washington. } ss.

Charles E. Fulton, being first duly sworn, upon his oath deposes and says:

That he is the agent of the libelant named in the foregoing libel; that he makes this verification for and on behalf of said libelant, because said libelant is a foreign corporation and has no officer or other agent within said District; that he has heard the foregoing libel read, knows the contents thereof and believes the same to be true.

CHARLES E. FULTON.

Subscribed and sworn to before me this 12th day of May, 1900.

[Notarial Seal] W. A. KEENE,
Notary Public in and for the State of Washington, Residing at Seattle, in said State.

[Endorsed]: Libel in Rem. Filed this 16th day of May, 1900. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the United States District Court for the District of Washington, Northern Division.

QUEEN ELIZABETH CO., LIMITED (a British Corporation), Libelant,
vs.
Steam Schooner "LAKME" Her Boats, etc.
CHARLES NELSON, Claimant.
No. 1708.

Claim of Charles Nelson.

Comes now Charles Nelson, owner of said steamer, her boats, etc., by Herbert S. Griggs, the agent for said owner, and claims said steamer, and prays to defend this suit.

W. A. PETERS and
HERBERT S. GRIGGS,
Proctors for Claimant.

State of Washington,
County of Pierce. } ss.

Herbert S. Griggs, being first duly sworn, says: That Charles Nelson is the true and bona fide owner of the steaher "Lakme," her boats, etc., against which this suit has been commenced. That for the purposes of this suit deponent is agent of said owner, and duly authorized to put in this claim. That at the time of the commencement of said suit said steamer, her boats, etc., was in deponent's possession, as the agent of said owner.

HERBERT S. GRIGGS.

Subscribed and sworn to before me this 16th day of May, A. D. 1900.

H. J. RAMSEY,
Notary Public in and for said State.

[Endorsed]: Claim. Filed in the United States District Court, District of Washington, May 17, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED (a British Corporation), Libelant,

vs.

The "LAKME," Her Boilers, etc., Respondent.

CHARLES NELSON, Claimant.

No. 1708.

Answer of Claimant and Petition to Bring in as Respondent the Tug "Tyee."

To the Honorable CORNELIUS H. HANFORD, Judge of the Above-entitled Court:

The answer of Charles Nelson, managing owner of the American steamship "Lakme," her boilers, engines, etc., whereof L. J. J. Schage is master, on behalf of himseif as the agent of the owner and on behalf of all others interested in said vessel and her cargo, and in answer to the libel filed herein by the said Queen Elizabeth Company, Limited, alleges.

I.

That he has no knowledge of, and therefore denies, each and every allegation in paragraph 1 of said libel contained.

II.

Claimant admits that on Saturday, April 14th, but at about 3:30 o'clock A. M., the tugboat "Tyee" was off Point No Point on Puget Sound, having in tow a ship which claimant is informed and believes was the said "Queen Elizabeth"; admits that said tug with said "Queen Elizabeth" in tow was at said time proceeding south; and that at about the same time said respondent, the "Lakme," was approaching and proceeding north and in a direction nearly opposite, admits that thereafter a collision occurred between said "Lakme" and said "Queen Elizabeth."

And claimant denies each and every other allegation in paragraph II of said libel contained, and avers the facts to be as hereinafter stated and not otherwise. Claimant has no knowledge as to the amount of damage sustained by said Queen Elizabeth, her owners, cargo or crew, or any of them, and therefore denies the allegations contained in said paragraph II with respect to said matters.

III.

Claimant denies each and every allegation in paragraph III of said libel.

IV.

Claimant admits the allegations contained in paragraph IV of said libel.

V.

Claimant admits the jurisdiction of the United States and of said court, but denies each and every other allegation in paragraph V of said libel.

And further answering said libel, and by way of petition against the tug "Tyee," the petitioner, Charles Nelson, alleges as follows:

VI.

That said Charles Nelson was at the times hereinafter mentioned managing owner of the American steamship "Lakme," her boilers, etc., whereof L. J. J. Schage at all of said times was and is master; that said vessel is a wooden propeller, having a capacity of four hundred four (404) tons register, and was up to the time of the collision hereinafter mentioned tight, staunch and strong and in every way seaworthy. That on Friday, April 13, 1900, at about 9:30 o'clock P. M. the respondent, said steam schooner "Lakme," left the port of Tacoma in the State of Washington, with a full cargo of lumber and other miscellaneous cargo bound for the port of San Francisco. in California. Said vessel was at said time and at all times prior to and up until the time when the collision hereinafter referred to occurred, staunch, tight, strong and well and properly manned, victualed, equipped and appareled and sound and seaworthy in every respect, and fit to perform her then intended voyage, and at all of said times her master, officers and crew were on the lookout for the safety and protection of said vessel, and at all of said times she had all of her lights in place, properly screened and burning brightly as required by the rules and regulations governing the navigation of Puget Sound water.

About 3:30 o'clock A. M. of Saturday, April 14, 1900, said schooner "Lakme," while proceeding north on her

said voyage and following her proper course along about the center of Puget Sound was approaching from the south, and had in sight the lights at Point No Point about one point off her port bow.

The night was a clear moonlight; the tide was, as claimant is informed and believes, slightly ebb, but about slack water at that point; at about this time, to wit, about 3:30 o'clock A. M. of said day, a tug was off said Point No Point approaching with a ship in tow, which ship was the said "Queen Elizabeth," and which tug was the said tug "Tyee," as the master and crew of the "Lakme" thereafter discovered. Said "Lakme" was then proceeding along her proper course, to wit, north, and was about in the middel of Puget Sound, having the western shore thereof a slight distance nearer than the eastern shore. Said tug and her tow were at the same time proceeding in the opposite direction, to wit, south bound as stated in the libel herein, for Port Blakeley, and were some distance nearer the western shore of Puget Sound than the "Lakme."

They were at said time observed by the lookout and officers of the "Lakme" about one point off her port bow.

Said vessels were then and at all the times they were approaching each other were in the clear and unobstructed vision of each other and of their respective masters and crews; and it was clear and evident to the officers and lookout and crew of the "Lakme," and if the officers and crew of said tug and her said tow had been properly on the lookout for the safety and protection of their respective vessel, it would have been equally clear

and evident to them; and the fact was, that as said vessels approached they were continually sheering to the port of each other, and that if they kept steady on the courses they were then following they would pass safely to the port of each other, with plenty of sea room and without any risk of danger or collision.

That as demanded by the exigencies and circumstances governing, and as required by the rules and regulations in force resepecting the method of navigating the waters of said Puget Sound, said "Lakme" was held steady on her said course and said tug and her tow, as they approached, were continually appearing further and further to the port of the "Lakme," and if said vessels had been held steady on their respective and proper courses they would have passed each other safely with plenty of sea room and without any risk and danger of collision. Said "Lakme" was at said time and all times being navigated under moderate speed and with all proper care and diligence on the part of her officers and crew. The said tug and her said tow were approaching at about the same speed as that of the "Lakme," to wit, between seven and eight miles per hour; when the "Lakme" and said tug were about six hundred (600) to eight hundred (800) feet apart and not more than four (4) minutes before the collision hereinafter referred to occurred, said tug "Tyee" blew two blasts of her whistle to indicate, and thereby indicating, to the "Lakme" that she was about to change her course and would pass to starboard; and the officers and crew of the "Lakme" immediately, and as required by law and by the rules and regulations governing the

navigation of said waters, answered with two blasts of her whistle; and the said tug "Tyee" immediately, and at the time she blew said blasts, changed her course and swung to port and diagonally across the bows and course of the "Lakme"; and the "Lakme" at the instant she answered with two blasts of her whistle as aforesaid, altered her course and attempted by the exercise of all possible promptness, skill, care, and good seamanship to change her course and pass safely to the starboard of said tug and her said tow. The sudden change in the course of the "Tyee" was unwarranted and unauthorized by any existing circumstances, and was directly contrary to and in violation of the rules and regulations governing the navigation of said waters under such circumstances, and was reckless, negligent and contrary to good seamanship; and made a collision between the "Lakme" and said tug, or said tow, one or both, or all three of them, possible or even probable. Notwithstanding said reckless and negligent and improper navigation on the part of said tug said "Lakme," by the exercise of diligence and good judgment and good seamanship to an unusual degree, succeeded in avoiding and passing safely to the starboard of said tugboat, passing to the stern of her and within thirty or forty feet thereof.

The tug's tow, said "Queen Elizabeth," had apparently failed to change her course promptly so as to follow the said tug upon the giving of the said signal for such change, but on the contrary, owing to the lack of a proper lookout, or the exercise of proper seamanship on said ship or otherwise, said ship was for some time after the

giving of signals to change the course of her tug and of herself as aforesaid, allowed to continue on her original course, so that when the "Lakme" had succeeded in safely passing the tug to starboard as aforesaid, the officers and crew of the "Lakme" found the said ship considerably to port but slowly swinging into a proper course following the tug; so that the said ship, which was and is a large iron ship of about seventeen hundred (1700) tons burden, and the said "Lakme" were approaching each other head on and a collision was unavoidable; and a collision of the said vessels while maintaining their respective courses would have resulted in the total loss of one or both of said vessels and in an immense loss of property and possible loss of life.

Just after safely passing the stern of the tug and before the extreme urgency of the situation had developed as aforesaid, the engines on the "Lakme" had been properly and in the hope of avoiding any collision whatever stopped, but when the certainty of a collision of some nature between the "Lakme" and the said ship became evident, owing to the reckless, negligent, and improper navigation of the tug in the first instance in suddenly changing its course and making a collision possible as aforesaid, and owing also to the negligent and improper handling and navigation of said ship as aforesaid, thereby making a collision inevitable, when the said urgency of the situation developed, the master of the "Lakme" in the exercise of the highest degree of skill and good seamanship, and in order to strike and receive from the "Queen Elizabeth" a glancing blow instead of one com-

ing head on, started the "Lakme's" engines and ordered her course so as to, and so that she did, strike the ship on her port bow and so as to, and so that she did receive a blow from said ship on the "Lakme's" port bow. As a result of said blow and collision the port bow of the "Lakme" was crushed, her stanchions on both the port and starboard side were broken; also her forward bulwarks and rail, her waterways and forward deck were strained and started, her forerigging and pilot-house and part of her deckload were carried away; her deckhouse and gallant forecastle were thrown two feet out of line and said "Lakme" was in other ways damaged so as to be compelled to put back to said port of Tacoma and there undergo temporary repairs, and to discharge a considerable portion of her cargo to the damage of the said "Lakme," her cargo and the owners thereof, and of her master and crew in the sum of nine thousand (9,000) dollars.

VII.

That whatever damage was done or occasioned to said ship "Queen Elizabeth" by said collision was due solely to or to a large extent caused by the reckless, negligent, and improper management and navigation of the tug "Tyee" as aforesaid, and to the reckless, negligent, and improper management and navigation of the said ship herself as aforesaid, and was not due in any respect whatever to any negligence, mismanagement, or failure on the part of said "Lakme" and her master and crew, or of any person on board of her to properly, promptly and carefully observe all the rules and regulations required by

good seamanship and governing the navigation of said waters.

VIII.

On or about the 16th day of May, 1900, the Queen Elizabeth Company, Limited, a corporation, the alleged owner of the ship "Queen Elizabeth" above named, filed a libel and commenced a suit in this court against the said steamer "Lakme," her engines, etc., only, for damages alleged to be sustained by the said ship "Queen Elizabeth" by the collision aforesaid, in the sum of ninety-nine hundred ninety-four (9994) dollars, and on or about the 17th day of May, 1900, this petitioner filed a claim to said steamer "Lakme," her engines, etc., with the stipulation for costs required by the rules and practice of this court, and also a stipulation in the sum of twenty-two thousand (22,000) dollars to release said steamer.

And your petitioner alleges that said steam tug "Tyee," her engines, etc., ought to be proceeded against for said damages in the same suit as said steamship "Lakme."

IX.

Said steam tug "Tyee" is now within this district and within the jurisdiction of this court.

X.

All and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

Wherefore, said respondent and petitioner prays that this Honorable Court will pronounce against the demands of the libelant in the original libel before men-

tioned with costs; and he further prays that process may issue according to the practice of this court and the rules of the Supreme Court in Admiralty against the steam tug "Tyee," her engines, etc., to the end that the said tug may be proceeded against in this suit for the damages alleged to have been sustained by the libelant, Queen Elizabeth Company, Limited, as if said tug had been originally proceeded against herein.

And the petitioner further prays that all persons claiming any interest in said steam tug "Tyee," her engines, etc., may be cited to appear and answer the libel herein and this petition, and that said tug "Tyee," her engines, etc., may be condemned and sold to satisfy the claim of the libelant for damages, if any, with interest and costs, and also the costs of petitioner herein, and that the petitioner may have such other and further relief as may be proper.

W. A. PETERS,
Agent for Owner.

H. L. GRIGGS,
W. A. PETERS,
Proctors.

United States of America,
District of Washington. } ss.

W. A. Peters, being first duly sworn, on his oath says: That he is the attorney and agent of the said claimant and of all persons interested in said "Lakme," respondent herein, and makes this verification on their behalf and because none of them are within said District or able to

make the same; that affiant has read the foregoing answer and petition and knows the contents thereof, and believes the same to be true.

W. A. PETERS.

Subscribed and sworn to before me this 26 day of May, 1900.

[Notarial Seal] MARION EDWARDS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Answer of Claimant. Filed in the United States District Court, District of Washington, May 26, 1900. R. M. Hopkins, Clerk, H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED, etc.,
Libelant,
vs.
Steamship "LAKME," etc.,
Respondent,
CHARLES NELSON,
Claimant and Petitioner.
} No. 1,708.

Order Allowing Process Against Tug "Tyee."

Now, this 26th day of May, 1900, this cause coming on regularly to be heard on petition and motion of Charles

Nelson, claimant, for an order to cause process to be issued against the tug "Tyee," her tackle, etc., the Court having examined the libel and the answer thereto filed herein by said claimant and the claimant's petition, and it appearing to the satisfaction of the Court that said answer and petition of the claimant contains suitable allegations showing fault and negligence on the part of said tug "Tyee" contributing to the same collision as that set out and complained of in the original libel herein, and showing the particulars of such negligence and that said tug "Tyee" ought to be proceeded against in the same suit for such damage, and praying that process be issued against said tug to that end—

Now, therefore, it is considered and ordered that upon the making and filing herein on the part of said claimant of a stipulation, with surety approved by this Court or by the collector or deputy collector of customs for said port of Seattle, in the sum of $250, and conditioned as in Admiralty Rule 59 prescribed, process shall forthwith be issued against and served on said tug "Tyee," her tackle, apparel and furniture, as a party respondent to the original libel herein, and to the said answer and petition of the claimant.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the United States District Court, District of Washington, May 26, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED,
Libelant,

vs.

Steam Schooner "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

CHARLES NELSON,
Claimant.

CHARLES NELSON,
Libelant,

vs.

The Steam Tug "TYEE," etc., and the British Ship "QUEEN ELIZABEH," etc.,
Respondents.

Stipulation to Consolidate Causes.

It is hereby stipulated by and between the parties to the above-entitled actions that the Court may make an order consolidating the same for the purpose of trial.

It is further stipulated and agreed that any testimony heretofore taken by either party to either of the above-entitled actions, or which may hereafter be taken by any

such party, shall be considered by the Court upon the trial of the above-entitled action in both of the above-entitled causes.

June 1, 1900.

PRESTON, CARR & GILMAN,
For "Queen Elizabeth."
H. S. GRIGGS and W. A. PETERS,
For Charles Nelson.
STRUVE, ALLEN, HUGHES & McMICKEN,
Proctors for Claimant Puget Sound Tugboat Co.

[Endorsed]: Stipulation. Filed in the U. S. District Court, District of Washington, June 1, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,
vs.
British Ship "QUEEN ELIZABETH" and the Steam Tug "TYEE,"
Respondents.
No. 1710.

Libel in Rem.

To the Honorable CORNELIUS H. HANFORD, Judge of the Above-entitled Court:

Charles Nelson, of the city of San Francisco, State of California, brings this his libel against the ship "Queen

Elizabeth," whereof Charles Fulton is or lately was master, now lying in port at Port Blakeley, District aforesaid, her tackle, sails, apparel, furniture, boats and other appurtenances, and against the steam tug "Tyee," of which ——— Bailey now is or lately was the master, now lying in port at Port Townsend, in the District aforesaid, her boilers, engines, machinery and other appurtenances, and against all persons intervening for their interests in said respective vessels in the cause of collision, civil and maritime, alleges as follows:

I.

That the libelant at the time of the happening of the damage and injury hereinafter mentioned was and still is the managing owner of the steam schooner "Lakme," of about four hundred four (404) tons burden, and brings this libel on behalf of himself and of all other owners, and all persons interested in the said steam schooner "Lakme," and in her cargo.

II.

That on or about Friday, the 13th day of April, 1900, at about 9:30 o'clock in the evening, the said steam schooner "Lakme" sailed from the port of Tacoma, in the State of Washington, with a valuable cargo of lumber and other miscellaneous cargo on a voyage to the city of San Francisco, State of California.

III.

That on Saturday. the following day, and at about 3:30 o'clock in the morning, the said steam schooner "Lakme" proceeding on her voyage, and being then with-

in sight of the light of Point No Point, on the western shore of Puget Sound, and being about in the center of said sound, and being northbound, her officers and crew sighted ahead of her and about one point to port and coming in an opposite direction, that is, southbound, the masthead and port lights of what afterwards they discovered to be the steam tug "Tyee" aforesaid, having in tow the ship "Queen Elizabeth" on a hawser of, libelant is informed and believes, about one hundred (100) fathoms. The night was clear and moonlight; the tide was slightly ebb but about slack water at that point; said vessels were then and at all times they were approaching each other in the clear and unobstructed vision of each other.

That the steamer "Lakme" at this time was staunch, tight, strong, well manned, victualed, equipped and appareled, sound in every respect and fit to perform her then intended voyage, with her master and crew on the lookout for the protection and safety of said vessel, and she had at that time her lights in place and burning brightly. That said "Lakme" was held steady on her course, and said tug and tow as they approached were continually appearing further and further to the port of the "Lakme," and if said vessels had been held steadily and properly on their respective courses, and in accordance with the rules and regulations covering the navigation of said waters and of vessels under the said circumstances, they would have passed each other safely with plenty of searoom and without any risk or danger of collision. The said "Lakme" was proceeding at about the

speed of between seven and eight knots per hour, and the said tug "Tyee" and her tow were apparently approaching at about the same rate of speed. When the "Lakme" and said tug were about one-quarter of a mile apart, and not more than four minutes before the collision hereinafter referred to occurred, said tug "Tyee" blew two blasts of her whistle to indicate that she would pass to the starboard of the "Lakme," and changed her course to port so that it lay across the bow of the "Lakme." Immediately on hearing said whistle the "Lakme" blew two blasts of her whistle and immediately changed her course to pass to the starboard.

That said sudden change in the course of the "Tyee" was unwarranted and unauthorized by any existing circumstances, and was directly contrary to and in direct violation to the rules and regulations covering the navigation of said waters under such circumstances, and was reckless, negligent, and contrary to good seamanship, and made a collision between the "Lakme" and said tug or said tow, one or both or all three of them, possible or even probable.

Notwithstanding said reckless and negligent and improper navigation on the part of said tug, said "Lakme," by the exercise of diligence and good judgment and good seamanship, to an unusual degree, succeeded in avoiding and passing safely to the starboard of said tugboat, passing to the stern of her and within thirty or forty feet thereof.

IV.

The tug's tow, said "Queen Elizabeth," had apparently failed to change her course promptly so as to follow the

said tug upon the giving of said signal for such change of course, but, on the contrary, owing to the lack of a proper lookout or the exercise of proper seamanship on said ship or otherwise, said ship was for some time after the giving of said signals by her tug to change the course, allowed to continue on her original course, although when the "Lakme" had succeeded in safely passing the tug to starboard as aforesaid; the officers and crew of the "Lakme" found the said ship considerably to port but slowly swinging into her proper course following the tug; so that the said ship, which was and is a large iron ship of about seventeen hundred (1700) tons burden, and the said "Lakme" were approaching each other head on and a collision was unavoidable; and a collision of said vessels while maintaining their respective courses would have resulted in the total loss of one or both of said vessels, and an immense loss of property and probable loss of life.

V.

Just after safely passing the stern of the tug and before the engines on the "Lakme" had been properly, and in the hope of avoiding any collision whatever, stopped, but when the certainty of a collision of some nature between the "Lakme" and the said ship became evident, owing to the reckless, negligent and improper navigation of the tug in the first instance in suddenly changing its course and making a collision possible as aforesaid, and owing also to the negligent and improper handling and navigation of said ship as aforesaid, thereby making a collision inevitable, when the said urgency of the situa-

tion developed, the master of the "Lakme" in the exercise of the highest degree of skill and good seamanship, and in order to strike and receive from the "Queen Elizabeth" a glancing blow instead of one coming head on, started the "Lakme's" engines and ordered her course so as to, and so that she did strike the ship on her port bow and so as to, and so that she did receive a blow from said ship on the "Lakme's" port bow. As a result of said blow and collision the port bow of the "Lakme" was crushed, her stanchions on both the port and starboard side were broken; also her forward bulwarks and rail, her waterways and forward deck were strained and started, her forerigging and pilot-house and part of her deckload were carried away; her deckhouse and gallant forecastle were thrown two feet out of line, and said "Lakme" was in other ways damaged so as to be compelled to put back to said port of Tacoma and there undergo temporary repairs and to discharge a considerable portion of her cargo to the damage of the said "Lakme," her cargo and the owners thereof, and of her master and crew in the sum of about nine thousand dollars.

VI.

That by reason of the careless, negligent, unskillful and improper management of the said steam tug, and of the said ship "Queen Elizabeth," and of the collision thereby occasioned of the said ship "Queen Elizabeth," with the steam schooner "Lakme," the said libelant and all persons interested with him in said steam schooner "Lakme" have sustained damages to the amount of nine

thousand dollars or thereabouts, for which they claim reparation in this suit.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process in due form of law may issue against the said steam tug "Tyee," her engines, machinery, tackle, apparel and furniture, and against the said ship "Queen Elizabeth," he sails, tackle, apparel, furniture and appurtenances; and that this Honorable Court will pronounce for the damages aforesaid and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and the Court is competent to give in the premises.

W. A. PETERS,
Agent for Owner.

H. S. GRIGGS,
W. A. PETERS,
Proctors.

United States of America,
District of Washington. } ss.

W. A. Peters, being first duly sworn, on his oath says: That he is the attorney and agent of the said libelant and of all persons interested in said "Lakme," and makes this verification on their behalf and because none of them are within said District or able to make the same;

that affiant has read the foregoing libel, knows the contents thereof and believes the same to be true.

W. A. PETERS.

Subscribed and sworn to be fore me this 24 day of May, 1900.

[Notarial Seal] MARION EDWARDS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Libel in Rem. Filed in the United States District Court, District of Washington. May 25, 1900. R. M. Hopkins, Clerk.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,
vs.
British Ship "QUEEN ELIZABETH" and the Steam Tug "TYEE,"
Respondents.
No. 1,710.

Order Amending Libel.

This matter coming on now to be heard upon the application of the libelant, Charles Nelson, for leave to amend his libel herein filed, so that the damages alleged and claimed in paragraphs V and VI shall be the sum of nine thousand (9,000) dollars, instead of the sum of twelve thousand five hundred (12,500) dollars;

And it appearing from statement made by counsel in open court upon such application that the damages set up in said libel were estimated on erroneous telegraphic information to counsel from the owner of said vessel, who was a resident of and was then present in San Francisco, State of California, and counsel has since been further informed as to the correct amount of said damages by said owner;

And it appearing that no answer, claim or appearance has been filed by any person on behalf of the Queen Elizabeth Company or the tug "Tyee":

It is now ordered and adjudged that the libelant may amend his libel herein as above requested by interlineation.

Dated this 26th day of May, 1900.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed in the United States District Court, District of Washington. May 26, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States, for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, Limited,
Libelant,
vs.
Steam Schooner "LAKME," Her Boilers, Engines, Tackle, Apparel, and Furniture,
Respondent.

CHARLES NELSON,
Claimant.

CHARLES NELSON,
Libelant,
vs.
The Steam Tug "Tyee," etc., and the BRITISH SHIP QUEEN ELIZABETH, etc.,
Respondents.

Stipulation to Consolidate Causes.

It is hereby stipulated by and between the parties to the above-entitled actions that the Court may make an order consolidating the same for the purpose of trial.

It is further stipulated and agreed that any testimony heretofore taken by either party to either of the above-entitled actions or which may hereafter be taken by any such party shall be considered by the Court upon the trial of the above-entitled action in both of the above-entitled causes.

June 1, 1900.

PRESTON, CARR & GILMAN,
For "Queen Elizabeth."

H. S. GRIGGS & W. A. PETERS,
For Charles Nelson.

STRUVE, ALLEN, HUGHES & McMICKEN,
Proctors for Claimant Puget Sound Tugboat Co.

[Endorsed]: Stipulation. Filed this 1st day of June, 1900. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

July 2, 1900.

District Court General Order Book, volume 5, page 216.

QUEEN ELIZABETH COMPANY, LIMITED,
Libelant,
vs.
Steam Schooner "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,
CHARLES NELSON,
Claimant.
} 1708.

CHARLES NELSON,
Libelant,
vs.
The Steam Tug "TYEE," etc., and the British Ship "QUEEN ELIZABETH," etc.,
Respondents.
} 1710.

Order Consolidating Causes.

Now, on this 2d day of July, 1900, in pursuance to the stipulation of parties filed in the above-entitled causes, it is ordered that the said causes be, and the same are hereby, consolidated, and that all proceedings hereafter be had and all filings made in No. 1710.

In the United States District Court for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,
vs.
The British Ship "QUEEN ELIZABETH," Her Tackle, Apparel, and Furniture, and the Steam Tug "TYEE," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondents.
QUEEN ELIZABETH COMPANY, Limited, (a British Corporation),
Claimant.
No. 1710.

Claim of Queen Elizabeth Company, Limited.

To the Honorable CORNELIUS H. HANFORD, Judge of said Court:

The Queen Elizabeth Company, Limited, owner of said ship "Queen Elizabeth," her tackle, apparel and furniture, intervening for its interest in the said vessel, her tackle, etc., appears before this Honorable Court and claims the said vessel, her tackle, etc., and states that it is the true and bona fide owner thereof, and that no other person is the owner thereof.

Wherefore, it prays to be admitted to defend accordingly, and that the said Court will be pleased to decree a restitution of the same to it, and otherwise right and justice to administer in the premises.

QUEEN ELIZABETH COMPANY, Limited.
By CHAS. E. FULTON,
Agent.

Sworn to before me this 1st day of June, 1900.

[Notarial Seal] H. T. PRICE,
Notary Public.

PRESTON, CARR & GILMAN,
Proctors for Claimant.

[Endorsed]: Claim. Filed this 2d day of June, 1900. R. M. Hopkins, Clerk. By H. M. Walthew Deputy.

In the United States District Court for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,
vs.
The British Ship "QUEEN ELIZABETH," Her Tackle, Apparel, and Furniture, and the Steam Tug "TYEE," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondents.
QUEEN ELIZABETH COMPANY, Limited, (a British Corporation),
Claimant.

No. 1710.

Answer.

Comes now the claimant, Queen Elizabeth Company, Limited, and for answer to the libel of the libelant herein, says:

I.

That as to the matters and things contained in the first and second paragraphs of said libel, this claimant is ignorant; it therefore neither admits nor denies the same, but leaves the same to be proved to the satisfaction of this Honorable Court.

II.

That the matters and things alleged in the third paragraph of said libel are not true, except that on Saturday, the 14th day of April, 1900, at about 3:30 o'clock in the morning, the said steam schooner "Lakme," within sight of the light of Point No Point on the western shore of Puget Sound, met the tug "Tyee," having in tow the ship "Queen Elizabeth" on a hawser of about one hundred fathoms, except that the night was clear and moonlight, and except that the said tug "Tyee" blew two blasts of her whistle to indicate that she would pass to starboard of the "Lakme," and changed her course accordingly, and except that the "Lakme" blew two blasts of her whistle in response to said signal of the "Tyee." That the whole truth in regard to said matter is as hereinafter alleged:

III.

Answering the fourth paragraph of said libel, this claimant says that the matters and things alleged therein are not true, except that said steam schooner "Lakme" passed said tug, and except that said ship "Queen Elizabeth" was swinging into her proper course following the tug, and except that she is an iron ship of about seventeen hundred tons burden.

IV.

Answering the fifth paragraph of said libel, this claimant says that the matters and things alleged therein are not true, except the allegation that the said "Lakme" collided with said "Queen Elizabeth." That the truth is as hereinafter alleged.

V.

Answering the sixth paragraph of said libel, claimant says that the matters and things alleged therein are not true, and that the truth is as hereinafter alleged.

VI.

Answering the seventh paragraph of said libel, claimant says that the matters and things therein alleged are not true, and that the truth is as hereinafter alleged.

And by way of further answer to said libel, and for the purpose of stating to this Honorable Court the facts in relation to the collision mentioned in the libel herein, claimant alleges said facts to be as follows, to wit:

I.

That claimant, before and at the time of the collision mentioned in the libel herein, was, since has been, and is now a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and prior to the times hereinafter mentioned was, since has been, and now is the sole owner and proprietor of a certain British ship called the "Queen Elizabeth," her tackle, apparel and furniture, which ship, at the time of the collision mentioned in the libel herein, was on a voyage from Shanghai, in China, via Port Townsend, in

Washington, to Port Blakeley, Washington, under charter for a cargo of lumber.

That on Friday, the 13th day of April, A. D. 1900, at the port of Port Townsend aforesaid the master of said ship "Queen Elizabeth" engaged the tugboat "Tyee," a tugboat operating on Puget Sound, to tow said vessel from Port Townsend, in the District of Washington, to Port Blakeley, aforesaid, in said district; and thereupon, at Port Townsend aforesaid, on the day last named, the said tugboat "Tyee" entered upon the performance of such service made fast to said vessel, and proceeded to tow her from Port Townsend aforesaid to Port Blakeley aforesaid.

II.

That on the morning of Saturday, April 14th, 1900, at about four o'clock A. M., while en route from Port Townsend aforesaid to Port Blakeley aforesaid, the said tugboat "Tyee" was off Point No Point, on Puget Sound, with said ship in tow. That said ship was at said time staunch, tight, and strong, well manner, victualed, equipped and apparelled, and sound in every respect, fit to perform her then intended voyage, and her master and crew were on the lookout for the protection and safety of said vessel, and she had at that time her lights in place and burning brightly, and at the same time and place the said tugboat was also well equipped, had in place and burning brightly her lights, and was duly performing its service. That just as the ship in tow, as aforesaid, passed Point No Point aforesaid, bound south for Port Blakeley aforesaid, at the hour aforesaid, the

American steamship "Lakme" came in sight, proceeding north and in the opposite direction from said tugboat and her said tow. That at that time the said tugboat and her tow and the said steamship "Lakme" were distant about one and one-half miles from the western shore of Puget Sound, and the eastern shore of Puget Sound was distant about two and one-half miles. That when the said steamship was so approaching said tugboat, and distant from her about three miles, said tugboat gave two blasts of her whistle to indicate that she would pass to starboard with her tow, and thereupon the said steamship, having the said tugboat and the said ship "Queen Elizabeth" in full view, and seeing their lights, answered the said signal of said tugboat with two blasts of her whistle, indicating that she, the said steamship, would pass to starboard. Thereupon the said tugboat duly altered her course so as to pass to starboard, and at the same time the master of the ship "Queen Elizabeth" duly altered her course so as to follow the said tugboat and pass to starboard; but the said steamship "Lakme" failed to alter her course to starboard, but altered the same to port, so that instead of passing to the starboard the said steamship came directly to and upon the said ship "Queen Elizabeth," striking her a glancing blow on her port bow, staving in her plates, carrying away her headgear, staving in the forecastle rails, carrying away the fish davit, fouling the starboard anchor, and otherwise injured the said ship, so as to damage said ship in the sum of $8,374.00.

That the said ship "Queen Elizabeth" was under a time charter, as aforesaid, whreby it was stipulated that for

each day's delay in procuring her cargo and proceeding to her port of destination, Port Iquiqui, Chili, she should pay the sum of $102 per day, and she has been delayed in making repairs on account of the damages aforesaid the full period of thirteen (13) days, to the damage of claimant in the sum of $1,320, and during the same period of delay the claimant has been put to loss on account of the expenses of master and crew in the sum of $300.

III.

That said collision was in no way caused by the fault or negligence of the said ship "Queen Elizabeth" or those on board of her, nor was it caused in any way by the fault or negligence of the said tugboat or those on board of her, but was solely due to the carelessness and negligence of those in charge of the steamship "Lakme," in that being a steam vessel, she did not avoid the ship "Queen Elizabeth," which was a sailing vessel, and in that the said steamship was negligently and improperly managed and navigated, and was in other respects negligent in the premises, which will be shown on the trial of this suit.

Wherefore, having fully answered, claimant prays to be hence dismissed, and for its costs and disbursements herein.

PRESTON, CARR & GILMAN,
Proctors for Claimant.

United States of America,
District of Washington. } ss.

Charles E. Fulton, being first duly sworn, upon his oath deposes and says:

That he is the agent of the claimant named in the foregoing answer; that he makes this verification for and on behalf of said claimant, because it is a foreign corporation, and has no officer or other agent within said district; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

CHAS. E. FULTON.

Subscribed and sworn to before me this 1st day of June, A. D. 1900.

[Notarial Seal] H. T. PRICE,
Notary Public in and for the State of Washington, Residing at Port Blakeley, in said State.

[Endorsed]: Answer. Filed this 2d day of June, 1900. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the United States District Court for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,
vs.
Ship "QUEEN ELIZABETH," Steam Tug "TYEE,"
Respondents.
No. 1710.

Claim of Puget Sound Tugboat Company.

To the Honorable CORNELIUS H. HANFORD, Judge of said Court.

John B. Libby, being duly sworn, on oath says that he is the manager of the Puget Sound Tugboat Company, a corporation under the laws of the State of Washington, having its principal place of business at Seattle; that said Puget Sound Tugboat Company is the sole owner of the said steam tug "Tyee," her tackle, apparel, and furniture, intervening for its interest in the said vessel, her tackle, etc., appear before this Honorable Court, and claims the said vessel, her tackle, etc., and states that it is the true and bona fide owner thereof, and that no other person is the owner thereof; wherefore it prays to be admitted to defend accordingly and that the said Court will be pleased to decree a restitution of the same to it,

and otherwise right and justice to administer in the premises.

J. B. LIBBY,
Manager Puget Sound Tugboat Company.

Sworn to June 4, 1900, before me.

[Seal] A. C. BOWMAN,
U. S. Commissioner.

STRUVE, ALLEN, HUGHES & McMICKEN,
Proctor for Claimant Puget Sound Tugboat Co.

[Endorsed]: Claim of Puget Sound Tugboat Company for said Tug "Tyee." Filed in the United States District Court, District of Washington, June 13, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States, for the District of Washington, Northern Division.

IN ADMIRALTY.

CHARLES NELSON,
Libelant,

vs.

The British Ship "QUEEN ELIZABETH," and the Steam Tug "TYEE,"
Respondents.

PUGET SOUND TUGBOAT COMPANY,
Claimant.

} No. 1710.

Answer of Claimant Puget Sound Tugboat Company.

Comes now the Puget Sound Tugboat Company, claim-

ant of the steam tug "Tyee," and for answer to the libel of the libelant herein says:

I.

That as to the matters and things alleged in paragraphs I and II of said libel, this claimant has no knowledge or information sufficient to form a belief, and therefore asks that the libelant be put upon his proof in respect thereto.

II.

Answering paragraph III of said libel it admits that on Saturday, the 14th of April, 1900, at about three-thirty o'clock in the morning, the said steam schooner "Lakme" was proceeding upon a voyage northbound, in sight of the light of Point No Point, on the western shore of Puget Sound, and that the officers and crew in charge of said steam schooner sighted ahead of her and coming in an opposite direction the steam tug "Tyee," having in tow the ship "Queen Elizabeth" on a hawser of about one hundred fathoms, and that the night was clear and moonlight; and that the said tug "Tyee" blew two blasts of her whistle to indicate that she would pass to starboard of the "Lakme," and changed her course to port accordingly, and that in answer thereto the said "Lakme" blew two blasts of her whistle; and it avers that the remaining matters and things in said libel are not true, but that the truth is as hereinafter set forth.

III.

That the matters and things contained in the fourth paragraph of said libel are not true, except that the

steam schooner "Lakme" passed said tug, and that the ship "Queen Elizabeth" was swinging in her proper course following said tug, and except, further, that the said ship was an iron ship of about seven hundred tons burden.

IV.

That the matters and things contained in the fifth paragraph of said libel are not true, except that the said "Lakme" passed the said tug on her starboard side and collided with the said ship "Queen Elizabeth," striking her a glancing blow on her port bow.

V.

That each and every of the allegations of paragraph VI of said libel are not true.

VI.

That the allegations of paragraph VII of said libel are not true, except that the matters in controversy herein are within the jurisdiction of this court.

And by way of further answer, this claimant avers:

That at all the times mentioned in the libel herein it was, and still is, a corporation organized and existing under the laws of the state of Washington, and was and is the owner of the steam tug "Tyee," a tugboat operating in the waters of Puget Sound and adjacent waters.

That on the 13th day of April, A. D. 1900, the claimant entered into an agreement with the master of the ship "Queen Elizabeth" to tow said ship by the said tugboat "Tyee" from the port of Port Townsend, in the District of Washington, to Port Blakeley, in said district;

and in pursuance of said contract said tugboat made fast to the said ship "Queen Elizabeth" on the night of said day, and took said ship in tow, and in towing said ship said tug had out a hawser about one hundred fathoms in length, which was strong and in good condition, and composed in part of manila and in part of steel wire, the steel wire end being made fast upon the said ship "Queen Elizabeth."

That on the early morning of April 14th, and shortly before four o'clock A. M., while en route from Port Townsend to Port Blakeley aforesaid, off Point No Point, the officers and men in charge of said tugboat "Tyee" sighted the steamship "Lakme" about four miles to the southward, approaching the said tugboat and her tow, and proceeding in the opposite direction from that in which the said tugboat was going. That the said tugboat "Tyee" continued on her course for a distance of between a mile and a mile and a half parallel, or nearly parallel, with the adjacent shore of Puget Sound to the westward of her course, and during all of said time and at all the times herein mentioned said steam tug "Tyee" was tight and staunch, properly officered, manned and equipped, and had her starboard and port lights trimmed and burning and in proper position and a light suspended from her stern and also two bright lights suspended from her masthead. That during all of said time and at all the times herein mentioned, the said ship "Queen Elizabeth" was tight and staunch, with proper officers and crew and proper lookouts on board, and with proper lights and was steering so as to follow in the course of the said tug.

That after the officers of the said tug "Tyee" had sighted the said steamship "Lakme," and while the said tug was proceeding on her course parallel with the shore for a distance of a mile to a mile and a half as aforesaid, the said steamship was approaching nearly end on, but at times would show her port light and at times her starboard light only. That when she was distant from the said tug "Tyee" between a mile and a mile and a half, the tug "Tyee" was distant from the said western shore about a mile; that the water on said shore is shoal for some distance and the ship "Queen Elizabeth," being an unusually large ship and in ballast, and the tides then running being such as were likely to set the said tug and her tow in shore, the officers in charge of said tug did not deem it prudent to attempt to pass the said steamship "Lakme" on her port shore side, or to take his tow further in shore; that he thereupon and for the reasons aforesaid, and for the further reason that at said time the said "Lakme" was approaching nearly end on, but showing her starboard light only, signaled the said "Lakme" with two blasts of his whistle, thereby notifying her of his desire and intention to pass the said "Lakme" on the starboard side and keep out farther to sea. That the officer in charge of said steamship "Lakme" understanding said signal and assenting thereto, answered with two blasts of his whistle; that thereupon the said tug "Tyee" in pursuance of said signals put her wheel astarboard and duly altered her course so as to pass to the starboard of the said steamship "Lakme," the ship "Queen Elizabeth" duly following. That the said steam-

ship "Lakme" passed the tug "Tyee" on her starboard side, passing about one hundred feet from her stern and so carelessly and negligently was said steamship handled after the giving of the aforesaid signals that she took a course so as to pass across the stern of the "Tyee" and between her and her tow, notwithstanding the said ship "Queen Elizabeth" had her lights properly burning and was steering to follow the course of the said tug "Tyee"; that the said steamship "Lakme" picked up the hawser by which said ship "Queen Elizabeth' was being towed, and the wire of said hawser cut into the stem of the said steamship "Lakme," and when the slack was taken up between her stem and the stern of the tug "Tyee" the manila part of said hawser parted near the rail of the tug, and the hawser remaining fast in the stem of the said steamship "Lakme," when it became taut the wire part of said hawser was parted near the bow of the ship "Queen Elizabeth," and by reason of the foregoing facts and of the careless and negligent steering of the said steamship "Lakme" she struck the ship "Queen Elizabeth" a glancing blow on her port bow. That said collision was in no way caused by the fault or negligence of the said tug "Tyee," nor by the fault or negligence of the said ship "Queen Elizabeth," but was solely due to the carelessness and negligence and incompetency of those in charge of the steamship "Lakme."

Wherefore the claimant prays that the libel herein be dismissed, and that it recover its costs and disbursements.

STRUVE, ALLEN, HUGHES & McMICKEN,
Proctors for Clainants.

State of Washington,
County of King. } ss.

J. B. Libby being first duly sworn, deposes and says: That he is the manager of the claimant herein, and makes this affidavit in verification of the foregoing answer in its behalf; that he has read said answer, knows the contents thereof, and believes the same to be true.

J. B. LIBBY.

Subscribed and sworn to before me this 17th day of October, 1900.

[Seal] H. J. RAMSEY,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within answer received and due service of same acknowledged this 17th day of October, 1900.

H. S. GRIGGS and W. A. PETERS,
Proctors for libelant Charles Nelson.
PRESTON, CARR & GILMAN,
Proctors for Claimant Queen Elizabeth Co., Ltd.

[Endorsed]: Answer of Puget Sound Tugboat Company, Claimant. Filed in the United States District Court, District of Washington. October 17, 1900. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the United States District Court, for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED,

Libelant,

vs.

Steam Schooner "LAKME,"

Respondent.

CHARLES NELSON,

Claimant.

CHARLES NELSON,

Libelant,

vs.

The British Ship "QUEEN ELIZABETH," and the Steam Tug "TYEE,"

Respondents.

THE PUGET SOUND TUGBOAT COMPANY,

Claimant.

Nos. 1710.

Stipulation as to Testimony of William J. Bryant.

It is stipulated herein on the part of the tug "Tyee" and the Puget Sound Tugboat Company, and the ship "Queen Elizabeth" and the Queen Elizabeth Company, Limited, to and with Charles Nelson, as claimant, and the steam schooner "Lakme," respondent, that Captain

William J. Bryant was at all times herein named United States Inspector of Hulls for the District of Puget Sound, and that on the —— day of March, 1898, as such officer, he made an official inspection of the steam schooner "Lakme" respondent herein, and issued a certificate of inspection, a copy of which is hereto attached and marked exhibit "A"; that the said Bryant, if called as a witness herein, would testify that it was a part of his official duty and was his custom in the inspection of vessels to examine into the condition and position of the ship's signal lights, and not to pass said vessel for inspection unless such signal lights were in proper shape and order; that he has no personal recollection of the condition of the signal lights and light screens of the steam schooner "Lakme" at the time of this inspection except that by reference to his certificate of inspection he is satisfied that said lights and screens were in proper shape and condition otherwise said ship would not have passed his inspection;

And it is stipuated that his testimony may be considered as part of the evidence in this cause in the same manner and subject to the same objections as to competency as if given by the witness orally herein upon formal examination on the hearing of this cause; It is further stipulated that the answer of the Puget Sound Tugboat Company, claimant in case number 1710 to the libel of Charles Nelson against the British ship "Queen Elizabeth" and the steam tug "Tyee," shall be deemed and treated as an answer to the answer and cross-libel of Charles Nelson in cause number 1708, wherein the

Queen Elizabeth Company, Limited, is libelant, and the steam schooner "Lakme" is respondent, and Charles Nelson is claimant thereof, and that in all matters wherein the said cross-libel of Charles Nelson in said cause number 1708 shall differ from his libel in cause number 1710 and the aforesaid answer not be pertinent thereto, all such matters in said cross-libel shall be deemed denied.

It is also agreed that the libel filed by the libelant in case No. 1690 may be considered as offered in evidence in this case in connection with the testimony of Captain Fulton.

PRESTON, CARR & GILMAN,
Proctors for the Ship "Queen Elizabeth" and the Queen Elizabeth Company, Limited.

STRUVE, ALLEN, HUGHES & McMICKEN,
Proctors for the Steam Tug "Tyee", and the Puget Sound Tugboat Co.

H. S. GRIGGS and PETERS & POWELL,
Of Proctors for Chas. Nelson and the Steam Schooner "Lakme."

[Endorsed]: Stipulation. Filed in the United States District Court, District of Washington. November 25, 1901. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States, District of Washington, Northern Division.

QUEEN ELIZABETH COMPANY, LIMITED,

Libelant,

vs.

Schooner "LAKME," Her Boilers, etc., CHARLES NELSON,

Claimant.

CHARLES NELSON,

Libelant,

vs.

The Steam Tug "TYEE," etc., and the British Ship "QUEEN ELIZABETH," etc.

Opinion.

(Filed February 3, 1902.)

PRESTON, CARR & GILMAN, for Libelant.

HERBERT S. GRIGGS, and W. A. PETERS, for Charles Nelson.

STRUVE, ALLEN, HUGHES & McMICKEN, for Puget Sound Tugboat Co.

HANFORD, District Judge.—For convenience in designating the different parties to these suits, the Queen Elizabeth Company, owner of the ship "Queen Elizabeth," will be referred to as the "libelant"; Charles Nelson, owner of the steam schooner "Lakme," will be referred to as the "cross-libelant," and the Puget Sound Tugboat Company, owner of the steam tug "Tyee," will be referred to as the "respondent." The first suit was commenced by the libelant against the "Lakme" to recover damages sustained in a collision between the "Lakme" and the British ship "Queen Elizabeth," which occurred between three and four o'clock on the morning of April 14th, 1900, in the vicinity of Point No Point light-house, on the west side of Puget Sound, the "Lakme" being at the time bound from Tacoma to San Francisco, and the "Queen Elizabeth" being towed by the steam tug "Tyee" from Port Townsend to Port Blakely. The cross-libelant charges responsibility for the collision upon the "Tyee" and claims damages for the injury sustained by the "Lakme."

In order that the full effect of some of the testimony introduced in behalf of the cross-libelant may be appreciated, a map showing the contour of the shores of Puget Sound from Foulweather Bluff to a point south of West Point light-house, is here inserted.

The night was clear and each of the vessels carried all of the lights required; though there is a dispute as to whether the colored ligts on the "Lakme" were arranged properly, so as to show from dead ahead to two points abaft the beam, as the law requires. It is admltted, however, that the vessels were seen approaching each other both by the officers in charge of the "Tyee" and of the "Lakme" when they were distant from each other three or four miles, but the parties differ with respect to the exact location of the vessels when their lights became visible to each other, and at the time of the collision. All agree however, that the collision occurred south of Point No Point light-house, a few minutes after the "Tyee" and the "Queen Elizabeth" had passed that point. The speed of the "Lakme" was seven and one-half miles per hour, and the "Tyee," with her tow, was making eight or nine miles per hour. The "Lakme" was in charge of her second mate, her captain and the first mate being asleep until the masthead lights of the "Tyee" were seen, when the captain was called and told that they were near Point No Point, but he was not informed that the other vessels were seen ahead, and he did not come out on the bridge until it was too late to avoid the collision. The second mate of the "Lakme" did not have a license or certificate entitling him to be employed as an officer of a steam vessel, either as master, pilot, or mate, and there was not at that time any licensed pilot on duty. The facts recited so far are either admitted or established by uncontradicted evidence. The particular circumstances and movements of the vessels imme-

diately preceding the collision are stated in the evidence of the officer who was in charge of the "Tyee," as follows: The "Tyee" took the "Queen Elizabeth in tow and started from Port Townsend southward, between one o'clock and two o'clock, A. M., and reached Point No Point in about two hours. As she was coming around Point No Point the lights of the "Lakme" were seen for the first time; the "Tyee" and the ship in tow made a curve around Point No Point until their position was approximately one mile from the west shore of Puget Sound, and then took a straight course, steering southeast, when the "Tyee's" helm came to steady on this course, the "Lakme" appeared to be straight ahead, but steering an irregular course, so that all her lights were visible at times, and then the red light and green light alternately disappeared. Four minutes before the collision, when the steamers were about one mile apart, and when the "Lakme" was showing her green light the "Tyee" signaled, giving two blasts of her whistle, indicating her purpose to pass on the starboard side; this was immediately answered by two blasts from the "Lakme," the pilot of the "Tyee" then put her helm hard to starboard, and she swung to port; at the same time the "Lakme," instead of turning to port promptly, as the signals indicated that she should do, swung around to starboard so that she showed her red light, and came on directly in the way of the other vessels, but steadied up when she came near to the "Tyee," when the witness, her pilot, called out, "Are you crazy or what? Starboard your helm! Starboard your helm!" The two steamers passed each other

starboard to starboard, the "Lakme" going astern of the "Tyee"; her stem caught the steel tow-line and she then swung to port, and went slipping along the tow-line until she struck the "Queen Elizabeth" on the port side of her bow. The tow-line parted just at the time of the collision. In the testimony of this officer he gives as the reason for sounding two blasts of the whistle for a passing signal that they were near to shore on the right-hand side, and the "Tyee," having the burden of a ship in tow, it was safer for her to pass the other steamer on her starboard side, because at that place the tide sets in toward the shore.

The testimony of the pilot who was in charge of the "Tyee," above narrated, is corroborated by the quartermaster, who was in the pilot-house steering the "Tyee"; it is consistent with all the evidence on the part of the libelant and of the respondent, and it harmonizes with the undisputed facts that the only signals given from one steamer to the other were two blasts of the "Tyee's" whistle, answered by two blasts from the "Lakme," and that the "Lakme" did pass on the starboard side of the "Tyee," and her port bow struck the port bow of the "Queen Eliabeth." On behalf of the cross-libelant the captain of the "Lakme" testified that when he came on the bridge after hearing the two blasts from the "Tyee," and the answer given by the "Lakme," the "Tyee" was just crossing the bow of the "Lakme," and the first thing he did was to inquire as to the position of the helm, and was told that it was hard astarboard, to which he responded, "Keep her there." The "Lakme" was then turn-

ing slowly to port, and the "Queen Elizabeth" was still off her port bow, and seeing that a collision was inevitable, he ordered the engines stopped and the helm hard aport, he did not order the engines reversed, because the propeller was liable to get foul of the tow-line. As to these matters I can find no conflict between the testimony given by the captain and the testimony for the other parties. There appears to have been time enough to change the wheel from hard-aport to hard-astarboard, while the captain was coming from his cabin, if the "Lakme" had been swinging to starboard, on a port helm, that movement would place her so that the "Queen Elizabeth" would appear to be off her port bow, and the fact that she was turning to port slowly with her helm hard-astarboard, corroborates the testimony tending to prove that she was not given her starboard helm until the two steamers were very close to each other. The captain does, however, give his estimate of the distances from the place where the vessels met, to Point No Point, and the west shore opposite, which, if accurate, would locate the place of the collision one mile, or a little more than a mile, farther from the shore, and one mile, or a little more than one mile, nearer to Point No Point, than indicated by the testimony of the witnesses who were on the "Tyee," and the difference in the location would tend to support the contention of the cross-libelant that the "Tyee" was in fault for giving two blasts of her whistle and going to port instead of observing the general rule of the road, requiring vessels meeting end on or nearly so, to turn to the right and pass each other port to port.

But considering the fact that the captain had no time to study the situation after coming on deck, and that his mind must have been fully occupied with other things, it is not probable that he could have made an estimate of the distance with as much accuracy as could the pilot of the "Tyee," who knew the route, had time for observation before there was any occasion for excitement, knew the speed his vessel was making, took notice of her compass, and ordered her courses. The first mate of the "Lakme" was asleep before the collision occurred. Both sides called him as a witness, but as I am not obliged to decide the disputed question with respect to the shape and construction of the screens or boxes in which the "Lakme's" colored lights were placed, I do not regard his evidence as being of any importance. The man who steered the "Lakme" has not been called as a witness, so the case for the cross-libelant depends mainly upon the testimony of her second mate, who was in charge of the deck, and the man who was on duty as lookout, and I regard the testimony of both of these witnesses as being entirely unworthy of belief. By way of illustration, the lookout, upon his examination in chief, conducted by the proctor for the cross-libelant, testified as follows:

"Q. How long after you reported the light on the port bow was any signal given by any ship?

A. A few minutes after he gave us two whistles.

Q. Who gave?

A. The tugboat gave us two whistles first.

Q. What was done then?

A. We answered the two whistles back again, and turned the wheel over.

Q. What way was the wheel turned when the whistle was given?

A. I was steering straight; after the whistle came he turned to the port, that called for hard-astarboard—it was turned to the port.

Q. You put your helm hard-astarboard?

A. Hard aport.

Q. When the two signals came?

A. When the two signals came.* * * *

Q. After the tug blew her two whistles did she make any change in her course?

A. Not before we came close to them, we make the change.

Q. What change did she make?

A. She turned the wheel to port too.

Q. What way did she come?

A. She came to cross our starboard bow.

Q. She came to cross your starboard bow?

A. Yes."

In answering other questions on his direct examination, this witness also testified that the order given by the second mate to the man at the wheel after the signals had been given, was "Hard-astarboard," and that the order was obeyed promptly; and on cross-examination, answering a direct interrogatory, he made this statement: "Yes, sir, our wheel was put hard to starboard." These contradictory statements make it impossible to ascertain from the testimony of this witness whether the "Lakme's" wheel was first turned to starboard or to port, after the signals were exchanged. I would not reject

his evidence for a mere inadvertent misstatement, but taken as a whole, it is confused and unsatisfactory.

The "Lakme" left Tacoma after 9:30 P. M., the evening preceding the collision, and her log shows that she passed West Point light-house at 1:40 A. M. In his deposition the second mate says, in effect, that he was the officer in charge of the deck from midnight until the time of the collision, that he made an entry in the log of the time of passing each point, that the speed of the "Lakme" was seven miles or ten miles an hour; that at twelve o'clock when he went on deck, she must have been 100 miles from Tacoma; that he did not know what courses were steered after passing West Point, except that his last course was west half north, that she was kept in the middle of the channel; that he first noticed the "Tyee" and the "Queen Elizabeth" when they were coming around Point No Point, three or four miles ahead of the "Lakme"; that he then saw only the "Tyee's" masthead lights; that he did not see her starboard light until she crossed the "Lakme's" bow; that after rounding the point, the "Tyee" was two points off the port bow of the "Lakme," and showing her red light. I now quote from his deposition the following questions and answers:

"Q. What, if anything, did you do with reference to steering your own vessel at that time?

A. We were steering clear. I did not do anything at that time until we got a little closer. She was still on our port bow when I ported our helm to give myself a little more sea room.

Q. That would throw you further off to starboard?

A. Yes, sir; but even if I had kept on my course, we would have gone perfectly clear. When she got close to us she was about a point on our port bow.* * * *

"Q. What happened after that with reference to signaling?

A. There was no signaling at all. He was coming on our port bow. I had my hand up to pull the whistle when he blew two, and of course I answered him with two. I said 'Hard-astarboard.' The man at the wheel put the wheel hard-astarboard.

Q. How long was that after you got back on the bridge and had called the captain before those signals were passed?

A. It may have been between three and five minutes. It may have been more and it may have been less.

Q. It may have been less than what? Less than three minutes? A. I could not exactly say.

Q. Do you know whether or not you were there any appreciable time?

A. I was there walking up and down the bridge, I should judge for about five minutes before the captain came up.

Q. And during that five minutes, what was the course of the two vessels?

A. We were going about west half north, I should judge, or west quarter north, I would not be sure."

Then answering further inquiries as to the distance of the "Lakme's" position out from shore at the time the signals were given, he made this statement:

"We were right in the center of the stream. We were just coming a midway course down the sound.

Q. Did you keep that position up to the time that you ported your helm to give him more room?

A. Yes, sir"

By referring to the chart, it will be seen that if the "Lakme" was any where near the middle of the sound; three or four miles south of Point No Point, and steering a course west a half north or west a quarter north, she would have been heading directly for the west shore, and any steamer showing a red light off her port bow would have been clear to the south and standing on a course which would have made a collision impossible, unless one of the steamers had turned and chased the other. The statment that the "Lakme" had traveled 100 miles in two hours and a half, also shows the witness to be stupid and reckless. On cross-examination, this officer reaffirmed the statement that after the tug rounded the point and straightened up on a southerly course, the "Lakme" was heading west half north, and later, on cross-examination, other questions were propounded and answered as follows:

"Q. How far were you apart when you first ported your helm?

A. We must have been probably a mile.

Q. Then you changed from west half north to what course?

A. West by south just to give myself a little more sea room.

Q. You changed from west half north to west by south?

A. Just about that.

Q. How could you change from west half north to west by south with a ported helm?

A. With a starboard helm.

Q. That is not what I asked you. You said you ported your helm to give yourself more sea room.

A. Yes, sir.

Q. And changed from west half north to west by south? A. Something about that.

Q. With the port helm, and then the tug and "Lakme" were about a mile apart when you ported your helm?

A. Yes, sir"

He also testified on cross-examination that when the "Tyee" blew two whistles, he supposed that he was obliged to answer with two. The testimony of this witness in its entirety, shows the man to be ignorant of the duties of an officer of a steam vessel, and entirely incapable of giving an intelligent report of the manner in which he handled the steamer preceding the collision, and I find no trustworthy evidence in the case with respect to the material facts to be weighed against the testimony of the pilot and quartermaster of the "Tyee." In the light of all the evidence I find the following facts to be fully proven: The "Lakme" before meeting the other vessels was out of the proper course for a vessel going north, being too far over toward the west shore instead of being on the right hand side of the stream; she was steered negligently; her wheel was turned the wrong way after answering and assenting to the passing signals; and without any excuse she failed to stop and reverse her engines when she came into dangerous proximity

to the other vessels, until it was too late to avoid striking the "Queen Elizabeth."

I consider that the evidence proves the "Lakme" to have been in fault in the following particulars:

1. For being under way without being in charge of a licensed pilot.

2. For approaching Point No Point from the southward, in the way of vessels going in the opposite directin, without any necessity or reason being so far over toward the west shore.

3. For steering an irregular course after the lights of the "Tyee" and her tow had come into view ahead of her.

4. For porting her helm when she was distant from the "Tyee" one mile or less, without having previously given the proper signals indicating her purpose to change her course to starboard.

5. For being too slow in putting her helm hard-astarboard after answering and assenting to the signal of the "Tyee," indicating that the steamers were to pass each other starboard to starboard.

6. For no stopping and reversing her engines promptly when the danger of a collision became apparent.

In view of the situation shown, I consider that the "Tyee" had a right to choose the course to be taken, to avoid a collision, and was justified in signaling to pass starboard to starboard and in changing her course in accordance with that signal, after it had been assented to by the "Lakme."

The "Tyee," therefore, did not commit any error which contributed to cause the collision, and the "Queen Elizabeth" is also shown by the evidence to be free from any

fault in the matter. The evidence proves that the damages to the "Queen Elizabeth," including demurrage for her delay while necessary repairs were being made, amounts to the sum of $4,500. A decree will be entered in favor of the libelant for said amount, with legal interest from the first day of May, 1900, and costs.

C. H. HANFORD,
Judge.

[Endorsed]: Opinion. Filed in the United States District Court, District of Washington. February 3, 1902. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States, for the District of Washington, Northern Division.

IN ADMIRALTY.

Consolidated Causes.

QUEEN ELIZABETH COMPANY, LIMITED (a British Corporation),
Libelant,

vs.

The Steamship "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

CHARLES NELSON,
Claimant.

No. 1708.

CHARLES NELSON,

Libelant,

vs.

The Steam Tug "TYEE," Her Boilers, Engines, Tackle, Apparel and Furniture,

Respondent,

THE PUGET SOUND TUGBOAT COMPANY,

Claimant.

And

The British Ship "QUEEN ELIZABETH," Her Tackle, Apparel and Furniture,

Respondent,

QUEEN ELIZABETH COMPANY, LIMITED, (a British Corporation),

Claimant.

No. 1710.

Decree.

This cause came on duly and regularly to be heard before the above-entitled court upon the pleadings, the testimony taken before United States Commissioner A. C. Bowman, to whom said cause was referred, and upon the testimony taken by deposition; and the Court having read and considered said testimony, and having filed its opinion in writing finding the facts in the above-entitled consolidated causes, and ordering a decree in favor of the libelant Queen Elizabeth Company, Limited, and against the claimant Charles Nelson and the sureties on his bond, C. W. Griggs and George Browne for the sum of $4,500.00,

with legal interest from the first day of May, 1900, and costs;

It is now therefore, on motion of Preston, Carr & Gilman, proctors for said Queen Elizabeth Company, Limited, ordered, adjudged and decreed that the Queen Elizabeth Company, Limited, a British corporation, do have and recover of and from Charles Nelson, claimant of the steam schooner "Lakme," her boilers, engines, tackle, apparel and furniture, and from C. W. Griggs and George Browne, the sureties on his bond herein filed for the release of said vessel, and each of them, the sum of $4,972.50, with interest thereon from the date hereof at the rate of six per cent per annum, together with its costs herein taxed at the sum of $———, and that execution issue therefor.

It is further ordered, adjudged and decreed that the libel of Charles Nelson against the British ship "Queen Elizabeth," her tackle, apparel and furniture, and against the steam tug "Tyee," her boilers, engines, tackle, apparel and furniture, be and the same hereby is dismissed, and that The Puget Sound Tugboat Company, claimant of said steam tug "Tyee," do have and recover of and from the said Charles Nelson its costs herein taxed at $———, and that execution issue therefor..

Done in open court this 5th day of February, A. D. 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Decree. Filed in the United States District Court, District of Washington, February 5, 1902. R. M. Hopkins, Clerk. H. M. Walthew, Deputy.

In the District Court of the United States, for the District of Washington, Northern Division.

IN ADMIRALTY.

QUEEN ELIZABETH COMPANY, LIMITED (a British Corporation),
Libelant,

vs.

The American Steamship "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent,

CHARLES NELSON,
Claimant.

No. 1708.

Testimony.

To the Honorable C. H. HANFORD, Judge of the Above-entitled Court:

Pursuant to the annexed stipulation, I proceeded with the taking of testimony in the above-entitled cause, on Wednesday, the 23d day of May, A. D. 1900, as follows, to wit:

LIBELANT'S TESTIMONY.

Mr. GRIGGS.—During the examination of these witnesses, the claimant will ask that all the witnesses, except the witness being examined, will be excluded from the room during the examination, also excepting Captain

Charles Edward Fulton, master of the "Queen Elizabeth."

Upon the request of proctor for claimant, witnesses are excluded.

CHARLES EDWARD FULTON, a witness produced in behalf of libelant, being first duly sworn, testified as follows:

Q. (By Mr. GILMAN.) State your name.

A. Charles Edward Fulton.

Q. State your age. A. Fifty-one.

Q. What is your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. I think since 1873, '74 or '75, or somewhere along there—it is a long time ago.

Q. How long have you been a seafaring man?

A. Since 1864.

Q. And of what class of vessels have you been master since you were a master?

A. I have been on the "Queen Elizabeth" going on eleven years, ever since she was launched, and the bark "Eudora" for seven years previous to this; the barkentine "Flora" two years and a half previous to the "Eudora." Previous to that I had a steamer from Glasgow to Washington; I brought her out for the chief of the signal service, Mr. Howgate.

Q. Your experience has all been in deep water vessels? A. Yes, sir.

Q. And in all parts of the world, has it been?

A. Yes, sir.

(Testimony of Charles Edward Fulton.)

Q. Of what vessel are you now master, if any?

A. The "Queen Elizabeth."

Q. Who is the owner of the ship "Queen Elizabeth"?

A. John Blake & Company of Glasgow are the principal owners, sir—she is a company ship.

Q. She is owned by a corporation?

A. Yes, sir.

Q. And you mean John Blake & Company are the principal owners of the stock?

A. Yes, sir; and managers.

Q. The corporation itself, the Queen Elizabeth Company, owns the ship? A. Yes, sir.

Q. That is a partnership corporation?

A. Yes, sir, as near as I can tell it is the Queen Elizabeth Ship Company, Limited, is what it is called.

Q. How long have you been master of the "Queen Elizabeth"?

A. Ever since she was launched; that is going on eleven years.

Q. You were her master on the 13th day of April, 1900? A. Yes, sir.

Q. Where was the ship on that day?

A. Port Townsend.

Q. On what voyage was she bound?

A. From Shanghai to Port Blakeley via Port Townsend.

Q. What cargo did she have? A. Ballast.

Q. No cargo? A. No cargo.

(Testimony of Charles Edward Fulton.)

Q. Now, on the 13th day of April, while lying at Port Townsend, did you engage a tug? A. Yes.

Q. For what purpose?

A. To tow the ship to Port Blakely.

Q. And what tug did you engage?

A. "The Tyee."

Q. State what the tug did in reference to taking you to Port Blakeley?

A. We left Port Townsend about 1:30 on the morning of the 14th of April in tow of the tug "Tyee." (Here the witness refers to memoranda.)

Q. (By Mr. BLAKE.) Before the witness proceeds I would like to ask what paper that is that you are reading from? A. Just my notes, sir.

Q. When were those notes made?

A. I made those notes before I came ashore.

Q. When, with reference to the time of the accident—collision?

A. This was made just a day or two ago, just before the—

Mr. GRIGGS.—I object to his using the notes, and I would prefer to have him testify from his recollection.

Mr. GILMAN.—Let me take your notes, Captain.

(Here the witness hands his notes to his counsel.)

A. (Continuing.) About 1:30 A. M., I think it was.

Q. That the tug made fast to you?

A. That we left. And when the anchor was hove up and carried, I told my mates to turn in and I would look

(Testimony of Charles Edward Fulton.)

after the deck, as they had been discharging the ballast late in the evening before and were tired.

Q. Who took charge of the deck when the vessel left Port Townsend in tow of the "Tyee"?

A. I was in charge. I was in charge all the time.

Q. Who was at the wheel?

A. Conrad Berg.

Q. Who was on the lookout?

A. Oscar Johnson, an able seaman.

Q. What about Conrad Berg; what was his capacity on the vessel.

A. He is an A B and boatswain.

Q. And Johnson was an able seaman?

A. Yes, sir, able seaman.

Q. Now what instructions were given to the lookout, if any; special instructions?

A. No special instructions, no, sir.

Q. And to the man at the wheel?

A. To follow the tug.

Q. Now, did you proceed on your voyage all right until the happening of the events which are the subject of this libel? A. Yes.

Q. Do you know the steamship "Lakme"?

A. Yes, I know her when I see her in the dock.

Q. You had a collision with the "Lakme" that night?

A. Yes, sir.

Q. Now, I wish you would state when you first saw the "Lakme," where you were and about what hour it was?

(Testimony of Charles Edward Fulton.)

A. It was near four o'clock in the morning and we were a mile, I think, above Point No Point.

Q. Do you mean above Point No Point?

A. I mean, that is, up the sound, that is to the southward of Point No Point, and about a mile and a half off our starboard shore I observed a steamboat light about two degrees to our port bow.

Q. What lights did you first observe?

A. The masthead and red light.

Q. Now, at about what distance was she at that time?

A. Well, I think about three miles.

Q. She was coming towards your vessel?

A. Yes, sir, towards our vessel.

Q. Now, what, if any, signals did you hear given by your tug to the "Lakme"?

A. Well, shortly afterwards I heard our tug give two blasts.

Q. Short or long blasts?

A. Oh, they were short blasts, which was answered similarly by the "Lakme."

Q. What was the answer of the "Lakme"?

A. Two blasts.

Q. After the blowing of those two blasts, what, if any, course did the tug take?

A. She changed her course to port, on the starboard helm.

Q. What, if any, directions did you then give to the man at the wheel?

(Testimony of Charles Edward Fulton.)

A. At the instant I didn't give him any. I saw him starting his wheel to follow it up.

Q. State whether or not you know of your own knowledge he did start with the wheel to follow it up?

A. Yes, sir, he started it.

Q. State whether or not your vessel did follow the tug? A. Yes, sir, she did.

Q. State whether or not she laid on the same course that the tug was taking, directly behind the tug?

A. She was following off with the tug, but not as rapidly as the tug was.

Q. Now, did you, at the time the wheel was starboarded and the tug went to port and your ship followed it to port, did you observe the course of the other vessel—that is, of the "Lakme"?

A. I noticed that he did not show his green light; he still kept his red light in view.

Q. And what would follow from that?

A. Well, I saw the ship—

Q. No; what would that indicate, what would you judge from the fact that he did not show his green light?

Mr. GRIGGS.—I object to that as irrelevant, immaterial and incompetent.

A. Well, it would indicate that he was putting his wheel the wrong way—that he was porting his wheel instead of starboarding it.

Q. If his wheel had been starboarded, so as to send the vessel to port, would it have brought the green light in view? A. Yes, sir, quickly.

(Testimony of Charles Edward Fulton.)

Q. Go on and tell what you did and what happened.

A. When I saw that he did not show his green light I ordered the helm hard-astarboard.

Q. State whether or not that order was obeyed?

A. Yes, sir, that order was obeyed.

Q. Well, what then?

A. And that shut—then I shut off his red light from my view, but I could see his masthead light from my bow. I was high out of the water, being in ballast; I think it was forty or thirty-five feet from the water. She shut in his red light, but I could see his masthead light still visible directly ahead, but coming nearer.

Q. And what then?

A. Fearing a collision, I shouted "All hands on deck."

Q. And then what happened?

A. Well, in a short space of time she struck a heavy glancing blow on the port bow crossing from starboard to port.

Q. After striking you the blow, did you notice what direction she took, that is, the "Lakme"?

A. Yes, sir, I did.

Q. What direction did she take?

A. She took the direction for land in the vicinity of Indian Point.

Q. Now, Captain, we had better take your diagram to illustrate this testimony. (Showing diagram to witness.) Now, Captain, look at this paper and tell me what it is. (Paper marked for identification "A.")

(Testimony of Charles Edward Fulton.)

A. Well, sir, this is on a scale of seven inches to the mile. This is two miles wide, and is about the position of the "Lakme" and my tug—the "Lakme" and the "Tyee," when they blew their whistles.

Q. I will mark "1," the position of the "Lakme," and "2," the position of the "Tyee"—now, go on.

A. That is the course our tug took on the starboard helm.

Q. From the point marked "2" to the point which I will now mark "3" is the course the tug took?

A. And from "1" to "4" is the course the "Lakme" took.

Q. And from "1" to—

A. To "5" is what she should have taken and where she should have been when my tug was there (showing).

Q. So that, as I understand you, the "Lakme" crossed the stem of the "Tyee" and hit you on your port side?

A. On the port bow, yes, sir.

Q. Did she go directly over your hawser, do you know?

A. No, sir, my hawser must have been hanging in a bight here; it must have been all slack, because the hawser was on the starboard bow and it fouled my starboard anchor, which was at the cathead, carrying away all the fastenings, and it must have been hanging in a bight like this (showing), and her cutwater must have taken my hawser somewhere about the water line or below it, and it parted here and parted on the tug.

Q. Captain, what lights did you have that night?

A. I had my usual headlights out, red and green.

(Testimony of Charles Edward Fulton.)

Q. Do you know whether they were burning?

A. Yes, sir.

Q. What about the competency of the man you had on the lookout?

A. A good man, sir a good man.

Q. And the man at the wheel?

A. He was A1.

Q. What, if anything, was the condition of your ship at that time?

A. In first-class order—first-class.

Q. Her steering apparatus in first-class order?

A. Yes, sir.

Q. Everything about her in first-class order?

A. Yes, sir.

Q. What can you say about the navigation of your vessel at that time; what, if anything, that should have been done was not done, or that ought not to have been done, was done?

A. I don't think I could have done anything else but follow the tug and her directions.

Q. What is the rule of the towed vessels in towing, to do what? A. To follow the tug.

Q. Now, when the "Lakme" struck you, what injury was done to your ship?

A. Well, she damaged several plates on the port bow and—

Q. Anything else?

A. Carried away the port cathead and fastenings, the jibboom guy, slacking up the bowsprit shrouds and

(Testimony of Charles Edward Fulton.)

denting the head rails, etc., and our starboard anchor davit bent to the deck, and plates—the castings and everything that went through on the deck were broke.

Q. What plates were those?

A. The plates that the iron davits go through on the deck, the castings, etc.

Q. Where was she taken for repairs?

A. Down to Moran's dockyard.

Q. And was there repaired?

A. Yes, sir.

Q. I will ask you whether or not all the repairs that were made there, were made necessary by this collision?

A. Yes, sir.

Q. What was the expense of those repairs?

A. The expense of those repairs was three thousand dollars; three thousand dollars have been used. And the chain cable I have had to have a link put in which was done at home. We got a bid from Tacoma, but accepted Moran's.

Q. It was done by contract, was it?

A. Yes, sir; but that did not include the chain cable or calking the decks.

Q. After the collision was there a survey had?

A. Yes, sir.

Q. By whom?

A. The Lloyd surveyor, Captain Pope.

Q. Assisted by any person?

A. No, sir; but Captain Burns came down to look at the work afterwards and approved of it.

(Testimony of Charles Edward Fulton.)

Q. I will show you this paper and ask you what it is? (Showing paper to witness.)

A. This is Lloyd's surveyor's report.

(Paper identified by the witness is marked "Identification B.")

Q. I will now show you another paper and ask you what that is (showing).

A. That is the bill signed by Moran's and it was settled by a draft on Hind, Ralf & Company of San Francisco.

Q. They are the agents of the company in San Francisco? A. Yes, sir.

Q. You know this was paid?

A. I have not heard it was paid since I gave them the draft about three days ago. I have not heard that it was settled yet.

(Document identified by witness is marked "Identification C.")

Q. Those repairs by Moran Bros. were made by contract you stated? A. Yes, sir.

Q. Did you call for bids for the doing of those repairs?

A. Yes, sir, from Tacoma.

Q. I will ask you whether this was the lowest bid received or not? A. Yes, sir.

Q. What was the amount of the bid from the Tacoma dock? A. Thirty-six hundred dollars.

Q. And you accepted the lowest bid and had the repairs made for three thousand dollars?

A. Yes, sir.

(Testimony of Charles Edward Fulton.)

Mr GILMAN.—I now offer in evidence the diagram, the surveyor's report and the receipted bill of Moran Bros. Company.

Mr. GRIGGS.—I make no objection to the first paper marked "Identification A," being the diagram which was introduced merely for the purpose of identifying the witness' testimony; but I object to the next paper marked "Identification B," being the surveyor's report, as irrelevant, immaterial, incompetent, and also object to the document marked "Identification C," being the receipted bill of Moran Bros. Company, as not sufficiently proven as an authentic document; and as irrelevant; immaterial and incompetent.

(Documents marked as above, "A," "B," and "C.")

Q. Now, in addition to those repairs made by Moran Bros. Company, were you compelled to buy any other materials or have any other repairs made?

A. Yes, sir, there was a new guy which I furnished myself—a boom guy.

Q. State what was the expense of that?

A. Seven dollars for the guy, besides the spunyarn and the labor on it.

Q. How much was the whole?

A. The whole would be probably forty dollars, for the time, labor, spunyarn and fitting it up. I made out a kind of a list of it and sent it to San Francisco. I forget what it was; I would refer them to the statement I sent to San Francisco.

Q. What else?

(Testimony of Charles Edward Fulton.)

A. Calking the decks—the forecastle decks; pitch and oakum and labor, I think somewhere in the neighborhood of fifty dollars.

Q. Anything else in the way of repairs?

A. I think I would prefer to refer you to the statement I sent on to San Francisco.

Q. That would not be testimony.

A. I did not fetch it, I didn't think you needed it. And the unshackling of the chain cable and bringing it in, which would amount to ten or fifteen dollars.

Q. Anything else?

A. I don't think of anything else that I can think of just now.

Q. What length of time did those repairs occupy?

A. There were eight days' repairing; I think the contract said eight days, but there was thirteen days in all used from the time the ship left Port Blakely until she got back here to her loading berth.

Q. So you were detained thirteen days in all?

A. Yes, sir.

Q. What was the cost of that detention per day to you, Captain?

A. I don't know; I will show you from the charter-party.

Q. Are you under charter or were you under charter?

A. Yes, sir.

Q. For what purpose?

A. To take a cargo of lumber to Iquiqui, Chili.

(Testimony of Charles Edward Fulton.)

Q. Are you bound by that charter-party to pay demurrage?

A. They are; the charterers are.

Mr. GRIGGS.—We object to that as not the best evidence; the charter itself is the best evidence.

Q. (By Mr. GILMAN.) Is this the charter that your vessel is under? A. Yes, sir.

Mr. GILMAN.—I offer this charter in evidence, and it is agreed that the charter may be copied into the record and the original charter returned to Captain Fulton.

Mr. GRIGGS.—We object to the charter-party as irrelevant, immaterial and incompetent, but have no objection to a copy of it being substituted instead of the original.

(Charter-party received in evidence, marked Libelant's Exhibit "D.")

Q. (By Mr. GILMAN.) What is the registered tonnage of your vessel? A. Seventeen hundred.

Q. Have you also been compelled during that time to pay and support wour crew? A. Yes, sir.

Q. What is the cost per day of that?

A. I would say about four hundred a month wages, besides provisions.

Q. That is, for wages besides the provisions?

A, Besides the provisions.

Q. Would that include your own wages?

A. Yes, sir.

(Testimony of Charles Edward Fulton.)

Q. Now, from the time you left Port Townsend until you sounded the call to come on deck, what portion of your crew was on deck besides yourself?

A. At the time of the collision?

Q. No, sir. From the time you left Port Townsend until you sounded them on deck again, how many were on deck besides yourself?

A. I don't exactly understand the question, Mr Griggs.

Q. You stated that when you left Port Townsend you directed some of your officers, and I don't know whether you said some of the crew, to go below.

A. They were on deck getting the anchor up, and when the anchor was hove up and carried I told them to go and lay down and I would take the boatswain who had been the night-watch at Port Townsend and put him at the wheel and take an A. B. Johnson and put him on the lookout—he had been laid up with a sore finger and had not been working at the ballast—I had the wheel man and I had him and I took charge of the deck myself.

Q. From the time you started up the sound in tow of the tug, the only persons on deck were yourself in charge and the lookout and the wheelman?

A. That is all, after my anchor had been hauled up and carried and everything in order.

Q. Now, did you remain on deck all the time from then until after the collision happened?

A. I did, sir.

Q. You were there continuously? A. Yes, sir.

Q. Have you been in the sound before, Captain?

(Testimony of Charles Edward Fulton.)

A. Yes, sir.

Q. So that you know the various points as you pass along? A. Oh, yes.

A. Did you have any idea about what rate of speed you were traveling after the time you were fully started and in tow?

A. I suppose they towed about five or six or seven knots; it depends on when they expect to get you—he wanted to get me up there at Port Blakely at about daylight, and I think he was going along about five or six knots.

Q. Do you know how long a tow-line you had?

A. No sir, I don't.

Q. Or about what?

A. I should think that tow-line—I think about six or seven hundred feet any way; I think so.

Q. How high up above the water was your deck at that time?

A. The top of my forecastle deck would be fully thirty-five feet above the water's edge.

Q. Now, how long before the whistles blew did you first observe the "Lakme"?

A. I could hardly tell, but I was walking backwards and forwards on the poop. I didn't stop and look at her when I first saw her light. I think she was three miles off anyway, and I did not keep constantly looking at the light.

Q. How long was that before the whistles blew?

(Testimony of Charles Edward Fulton.)

A. I should say it was from three to five minutes; I could not state exactly.

Q. As soon as you heard the whistles, did you know which whistle it was that blew first?

A. Yes, sir, I could see that our boat was the one that blew the first whistle.

Q. What kind of a night was it?

A. It was a beautiful clear morning; a moonlight morning—just break of day.

Q. Were you walking or standing when you first saw the "Lakme's" light?

A. I was standing on the port side of the poop when I first observed the light.

Q. Did you see the "Lakme's" green light at that time?

A. No, sir; I never saw the green light all through the business, not once.

Q. Well, then, were you following at that time the exact course of the tug? A. Right after.

Q. All the time? A. All the time.

Q. And on which side of your ship, the port or starboard, did you observe the "Lakme"?

A. When I first observed her she was about two degrees on the port bow.

Q. Two degrees on the port bow?

A. Just about two degrees, I could see her—if I was standing amidships she might appear directly ahead, but me standing on the port side, I could see her just open a little on the port bow.

(Testimony of Charles Edward Fulton.)

Q. And you saw her red lights?

A. I saw her red lights.

Q. Two degrees on the port bow?

A. Just about two degrees on the port bow.

Q. How long after the tug's whistles were blown did the "Lakme's" whistle answer with two blasts?

A. I should think it was immediately; I would say it was immediately—as quick as it could be done.

Q. When the tug fell to port, you say that you noticed that your wheel was properly—

A. Yes, sir, my men were starboarding.

Q. So as to bring it to port and follow the tug?

A. Yes, sir.

Q. How near were you standing to the wheel man at that time?

A. About as far as from here to the door—about thirty feet.

Q. Do you know about how far away you were from the "Lakme" at the time those whistles were blown?

A. Well, I think we must have been a mile—in the vicinity of a mile at the time them whistles were blown—I could not tell exactly, but in the vicinity of a mile.

Q. Were you as far away from the "Lakme" as you were from the shore on the starboard?

A. I think so, yes, sir, I think so.

Q. Now, according to the diagram which you have drawn to illustrate your testimony, which is marked "A," the "Lakme," at the time you were approaching her, was

(Testimony of Charles Edward Fulton.)

slightly farther away from the starboard shore than you, wasn't she?

A. No, sir, I think they were running parallel with the shore at that time.

Q. Running parallel with the shore?

A. Yes, I think so.

Q. But the "Lakme" was a little further?

A. Well, I think by seeing her red light that she probably was a little farther off shore than me; that is, I could see her red lights anyway, whether her green was visible from farther ahead, I could not say.

Q. Did you observe particularly her range lights?

A. I did not.

Q. You observed only her masthead lights?

A. Only her masthead.

Q. Did you observe, or did you make any note at all of the relative position of the masthead light and the red lights, so as to know just exactly what her course was?

A. No, sir, I did not.

Q. You did see her about two points off your port bow?

A. About two degrees; and if I had been standing amidships she would have been almost directly ahead, but me standing on the port side, my poop was higher up over the forecastle deck.

Q. Now, Captain, you saw that you thought that your hawser or tow-line was slack at the time the "Lakme" struck? A. Yes, sir, not a doubt about that.

Q. You mean that the tug must have stopped?

(Testimony of Charles Edward Fulton.)

A. The tug must have stopped, because my hawser was all slack, and there was no other way that he could have of avoiding fouling my starboard anchor unless it was slack. There was no other way. If I had a piece of paper I could illustrate this to you. It must have been hanging in a bight.

Q. The starboard anchor at the time was hanging in the proper place in the starboard?

A. On the cathead.

Q. On the starboard cathead?

A. On the starboard cathead, and the hawser was on the starboard.

Q. And the hawser was also on the starboard?

A. Yes, sir.

Q. Now, relative to the position of the cathead, where was it, above or below?

A. Where the hawser went out over the bow, of course that is above the fluke of the anchor.

Q. Did it come directly in over the bow?

A. It came in directly over the bow about six or eight feet abaft of the night head.

Q. Will you show us that diagram there and draw just exactly the relative position of the starboard anchor, and the bow of the ship and the point where the hawser came in over the bow?

A. Well, say that that is the cathead, now, there is two walking chocks, one would be here and one there—there is two walking chocks and I can't tell you whether

(Testimony of Charles Edward Fulton.)

the hawser came through that walking chock or that one (showing). The anchor was here (showing).

Q. How was the anchor hanging from the cathead?

A. The anchor was hanging from the cathead: it was hanging fluke up.

Q. How far was the after chock from the cathead or from the fluke of the anchor?

A. Forward, do you mean?

Q. Yes. A. Not up and down.

Q. No; forward. What was the distance between the after chock and the anchor fluke?

A. Ten or twelve feet.

Q. And what was the distance between the two chocks which you have marked on there?

A. Say five feet, four or five; I am not certain.

Q. This testimony which you are giving is in reference to a diagram which we will mark "A1," being a part of your exhibit "A," is it? A. Yes.

Q. Now, when did you first notice that the hawser was fouled in the starboard anchor?

A. After the collision I went forward to see what was the reason, and the hawser was parted and the anchor—

Q. Where was the hawser parted?

A. Just outside of the nighhead there (showing, about two fathoms or a fathom and a half).

Q. Outside the nighthead?

A. Outside the nighthead.

Q. Does the nighthead correspond with the chocks?

A. Yes, this is the nighthead (showing).

(Testimony of Charles Edward Fulton.)

Q. At the end of the bowsprit?

A. The very end of the bow.

Q. And you say the hawser parted about a fathom or a fathom and a half beyond the bow of the boat?

A. Yes, sir, I think it must have caught on our cutwater, on our stem.

Q. Now, what portion of the hawser had fouled the anchor, the starboard anchor?

A. The only way I can account for it is that this steamboat hawser slacked up and hung down and caught the lower part of this anchor, and as I was ranging ahead the hawser would came astern, and it fouled this and tore away my anchor davit that was here (showing), the anchor davit and bit was fastened to this (showing), that was bent down to the deck, and all the fastenings here was gone and when that davit bent down to the deck it caught the rail right there (showing).

Q. Now, at the time you saw the hawser was it fouled or attached to the anchor in any way?

A. No, sir.

Q. It was not? A. Oh, no, sir.

Q. At the time you saw the hawser it was parted?

A. It was parted, just the end hanging there.

Q. And the end was hanging down? A. Yes.

Q. About a fathom or a fathom and a half?

A. Yes, sir, about a fathom or a fathom and a half outside of the nighthead.

(Testimony of Charles Edward Fulton.)

Q. Were there any other ropes running around to the anchor that had been broken?

A. No, sir, nothing.

Q. What kind of a hawser was that?

A. It was a steel hawser that they used for towing boats.

Q. It belonged to the tow-boat? A. Yes, sir.

Q. Did you see the balance of the hawser?

A. No, sir; I never saw the balance of the hawser. Captain Libby said that he picked it up on the steamer's bow when she came in; that is all I know about it.

Q. You say you don't know of your own knowledge where else it did part?

A. No, sir; I know it parted there and must have parted from the tug also.

Q. Now, you say you were standing at the time the whistle blew, you were standing about thirty feet or so from the wheel?

A. Yes, sir, just about that, along in front of the poop.

Q. Did you look immediately at your wheelman to give the order?

A. I looked at him. I didn't give him any orders because he was following the tug. He saw the tug falling to port and he starboarded his helm.

Q. You saw him do that? A. I saw him do that.

Q. That was immediately after the whistles blew?

A. Just after the whistles blew.

Q. Was there any time at all that elapsed?

(Testimony of Charles Edward Fulton.)

A. There might have been a second—a little time elapsed—I could not tell.

Q. Did your wheelman change the course of the vessel from that time on?

A. No, sir, only after the collision the captain of the tug then ordered our helm hard aport, because we were heading across stream then.

Q. The captain of the tug?

A. The captain of the tug after the collision, just after the collision, when we were heading across stream he sung out to put the helm hard aport.

Q. But from the time you saw your wheelman swing the boat to port he continued to swing the boat to port until the tug gave the direction to swing back to starboard, is that right?

A. Yes, sir, the wheel was to starboard from that time until he gave the direction to put it hard aport.

Q. That is, it remained at starboard until after the collision? A. Yes, sir.

Q. Now, I think I understood you to say that the tug fell away to port a little more rapidly than you did?

A. Yes, sir.

Q. About how much more rapidly or could you fix that in any way?

A. Well, with the tugboat it falls off half as fast again as a ship will do—as fast again. I would say just as fast again she fell off.

Q. That is understood as a matter of experience?

(Testimony of Charles Edward Fulton.)

A. Yes, sir, that is a matter of experience that they fall off quicker.

Q. They fall off much quicker than a ship?

A. Than a sailing ship, yes, sir.

Q. Did you notice how far the "Lakme" was away from the tug at the time it passed the tug, or how far it missed the tug? A. No, sir, I could not say.

Q. How close did they run together, do you know?

A. I could not say.

Q. Well, was it some distance or very close?

A. He must have passed the steamer over the length of himself anyway, must have passed it over his own length from the tug, anyway.

Q. That is, by over the length of the "Lakme"?

A. Yes, sir.

Q. And at the time it passed the tug, did you notice then whether you could see either the red or green light?

A. At that time he was just ahead of me; I had shut his red light in then.

Q. You could not see the green light?

A. I could not see his red; I shut it in; the mast-head light was right ahead of me.

Q. How far were you from the "Lakme" then; just about the length of the tow-line, I suppose?

A. Not much more than that; it could not be much more than that.

Q. At that time you and the "Lakme" were approaching directly head on, were you not?

A. I could not tell you whether he was approaching

(Testimony of Charles Edward Fulton.)

direct, but I was swinging off on an angle and it appeared to me that he must have been swinging—I was swinging on an angle from south—southeast to east, and it appeared that he must have been swinging on an angle from northwest to north.

Q. You think he was still swinging to port?

A. I think he was still swinging to starboard; he must have been swinging to starboard.

Q. That was when he passed the stern of the tug?

A. When he passed the stern of the tug, but I could not say.

Q. Now, is that what you mean, that the "Lakme" was swinging to port, or starboard, when he passed the tug?

A. I think he must have been swinging to starboard. I was swinging to port on my starboard helm. If you will let me see about that.

Q. Don't you mean—I don't want to confuse you—don't you mean, as a matter of fact; that the "Lakme" was swinging to your starboard, but was swinging away to its own port?

A. No, sir; I was swinging to port on my starboard helm; and he kept coming about on the opposite direction; and he must have been swinging to starboard on the port helm, otherwise he would have gone clear of me; if he ported his helm he would have cleared me.

Q. You think he must have been swinging to starboard?

A. I think he must have been swinging to starboard.

Q. How could you tell?

(Testimony of Charles Edward Fulton.)

A. I could see he was not swinging to port.

Q. Could you see by the starboard light?

A. I could see that he was not swinging to port.

Q. Could you see from the time the whistles blew whether the "Lakme's" course as changed at all to port?

A. I could not tell you a single thing about that, only I never saw his green lights, never once; nothing but his red and masthead.

Q. Did you keep close enough watch of the "Lakme" to know whether there was any change in her course, from port to starboard or from starboard to port?

A. I watched that after I saw him getting nearer, then I watched him very carefully, but before that I did not watch him very carefully at all.

Q. Now, exactly when was it that you sounded all hands on deck, how far off was the "Lakme" from you at that time?

A. A couple of ship lengths off, probably, or a ship's length; I could not tell you; perhaps a couple of ship's lengths.

Q. Do you remember where the "Lakme" was with reference to the tug at the time you sounded the crew on deck; how close was she to the tug?

A. No, sir, I could not tell you that.

Q. About where was she from the tug?

A. Well, she was directly ahead of me.

Q. How far apart were the tug and the "Lakme," do you think at that time?

A. I could not say how far they were; perhaps the

(Testimony of Charles Edward Fulton.)

length of the "Lakme," or somewhere along there; there was a space.

Q. There was a good space?

A. There was a space, but how far I could not say.

Q. Had you passed any other ships on the way down from Port Townsend to Point No Point?

A. There was a tow passed in shore of us just after the collision; I can't tell what kind of a tow it was.

Q. To the east or west?

A. In shore, to our starboad shore, to the west of us.

Q. Where was that?

A. Just after the collision.

Q. Just after the collision? A. Yes, sir.

Q. Did you pass any other ships on the way down just before the collision?

A. No, sir, I did not see anything before the collision.

Q. You did not pass any boats prior to the collision?

A. I don't remember seeing any.

Q. You don't remember what boat it was you passed after the collision? A. No, sir.

Q. Your boat came directly away after the collision to Port Blakely and then went over to Moran's for repairs?

A. Went over to Moran's for repairs, yes, sir.

Q. And you say from the time you left Port Blakely until you got back with the repairs finished it was thirteen days? A. Thirteen days.

Q. Now, when you are following a tow, as you were in

(Testimony of Charles Edward Fulton.)

that case, do you also follow your compass and keep your course?

A. Oh, no, sir. We follow the tug, unless I thought she would run into danger, but not in this case.

Q. But not in this case? A. No, sir.

Q. Do you know where the tug "Tyee" was coming from when it took you up at Port Townsend?

A. No, sir, I don't.

Q. I believe you stated that all they desired at the time was to bring you into Port Blakely in the morning?

A. Yes, sir, I understood he would get up there just about daylight; that was what I understood.

Q. Who made the arrangement with the "Tyee" for to tow you?

A. I made the arrangement with the agents down there at Port Townsend.

Q. When did you make this arrangement?

A. On the same day.

Q. Do you know the size of the hawser, your tow-line; you say it was a steel hawser?

A. Yes, sir. I should say about a five or six-inch steel rope.

Q. When you were being towed did you notice any appreciable sag to the hawser?

A. It is perfectly tight when she is under tow.

Q. No sag at all?

A. Just a little sweep to it, but not to amount to anything. A ship as high as I was out of the water, the hawser was clear of everything and clear out of the water.

(Testimony of Charles Edward Fulton.)

Q. Do you know about how much a hawser of that kind would weigh, to the fathom?

A. No, sir, I don't, unless I was on board I could tell you by my rule, but I could not tell you now.

Q. When you called your crew on deck, did you notice how many of them appeared, or did you pay any particular attention to that?

A. The first one that came on deck was my wife; she came running up out of her cabin, and on her way up she called the officers in the hallway.

Q. And then?

A. And then they all came tumbling out one after the other; I think the second mate was out first, the second mate and the carpenter, I am not certain, but I think so. They all came tumbling out one after the other.

Q. Now, you say you called them on deck; just what order did you give when you did that?

A. I just sounded "All hands on deck."

Q. You were then standing near the stern of your ship?

A. No, sir, I was standing on the forward part of the poop, about twenty or thirty feet from the wheel.

Q. How far was that from the stern?

A. About thirty feet, sir.

Q. How long is your ship?

A. She is two hundred forty-two feet on the keel.

Q. And how long on the deck?

A. Over all about two hundred and fifty, I think.

Q. What is her beam? A. Forty feet.

(Testimony of Charles Edward Fulton.)

Q. What is her total depth from the deck to the keel?

A. Twenty-two and a half, I think; in that vicinity, twenty-two and a half depth.

Q. I thought you said that the deck was thirty-five feet above the water?

A. At the bow, on the top of the bow.

Q. Did you hear any orders given while the collision was imminent?

A. No, sir, I did not, not a whistle aboard the "Lakme" or aboard the tug did I hear.

Q. Did you make any report to any officer or anybody after you came ashore in regard to the collision?

A. Only I handed in my protest at the consul's; that's all.

Q. The British consul? A. Yes, sir.

Q. Is that here in Seattle?

A. Here. It was Mr. Klocker, the consul from Port Townsend, and I notified my protest before him.

Q. When was that? A. That was Monday.

Q. The 16th?

A. Yes, sir, Monday, the 16th.

Q. Did you keep a copy of that?

A. Yes, sir, I have it on board.

Q. You can produce it, can you? A. Yes, sir.

Q. Did you make any report to anybody else?

A. That is all, sir. I then undertook to try and libel the "Lakme," but she got away before I got the libel served.

Q. You had papers made out for a libel?

(Testimony of Charles Edward Fulton.)

A. Yes, sir, I had papers made out for a libel.

Q. Did you get so far as to swear to the libel?

A. Yes, sir, I had the sheriff send it to Tacoma.

Q. That was on Monday, the 16th?

A. Yes, sir.

Q. Was that libel prepared by your same proctors that are your counsel in this suit? A. Yes, sir.

Q. It was the same kind of a libel; it was a single libel against the "Lakme" on behalf of the "Queen Elizabeth"? A. Yes, sir.

Q. Captain, you say it was about four o'clock when you saw the "Lakme," or about four o'clock when the collision occurred?

A. I think a little before four o'clock when the collision happened.

Q. Did you note the time particularly then or immediately after?

A. I noticed the time sometime after. I just ran forward to see if there was anything wrong with my ship, and I came back, and I think it was about four o'clock then.

Q. Do you know exactly what time it was when you came back and looked?

A. No, sir, I don't, but I have a distinct recollection that it was about four o'clock.

Q. Did anybody on your ship make any particular note or observation in regard to the time?

A. I think it was my wife I first asked what time it was. I think at that time I heard them tell me that it

(Testimony of Charles Edward Fulton.)

was about four o'clock or ten minutes to four by the chart house clock; somewhere along there; it was a little before four o'clock.

Q. How long had Oscar Johnson the lookout, been in your employ?

A. He has been on board since leaving New York, and we left New York—I don't recollect—

Q. (By Mr. GILMAN.) Where did you go from New York—to Shanghai?

A. New York to Shanghai. When was the Lipton yacht race?

Mr. GRIGGS.—Last fall sometime.

A. Yes, sir.

Q. How long had your wheel man been with you?

A. He was with me longer; he was with me since I left Antwerp in last July.

Q. Did you notice what was the condition of the tide when you were passing Point No Point?

A. No, sir.

Q. Or the time during or just after the collision?

A. No, sir.

Q. Was there any wind blowing at the time?

A. No, sir, it was calm.

Q. Where is Indian Point; the point which you referred to?

A. Indian Point I should think is nearly north from Point No Point.

Q. Where?

(Testimony of Charles Edward Fulton.)

A. Nearly north magnetic from Point No Point.

Q. Is it on Whidby Island or on the mainland?

A. There are so many islands there.

Q. How far were you from the land which you call Indian Point, at the time the tug ordered you to change your course?

A. Four miles—three or four, or five miles, surely.

Q. Did you notice how far you were from the main land south of Point No Point ?

A. You mean to starboard?

Q. Yes.

A. I suppose a mile and a half off the shore.

Q. When you rounded Point No Point and went south did you notice particularly what course you were taking then? A. No, sir.

Q. With reference to the shore line?

A. I think we were going parallel with the land after we got past Point No Point.

Q. That is the usual course?

A. Yes, sir.

Mr. PETERS.—Will you allow us to inspect the log?

Mr. GILMAN.—Yes.

The WITNESS.—This (showing) is the official log, and this (showing) is the ship's log.

Q. (By Mr. GRIGGS.) Do you know the captain of the schooner "Selia," Capt. Ferdelias?

A. No, sir.

Q. She was a schooner over at Port Blakeley?

(Testimony of Charles Edward Fulton.)

A. The "Selia"?

Q. I think that is the name of the schooner.

A. No, sir—what is his name?

Q. Captain Ferdelias.

A. No, sir, not by that name.

Q. Did you have any talk with any of the captains of the vessels over there, about Monday or Tuesday, or sometime shortly after the collision occurred?

A. I don't remember about it, no, sir.

Q. Did you have any talk with any one of them at all, that you remember?

A. No, sir. I was talking to some of them last night.

Q. I mean shortly after the accident.

A. No, sir, I don't remember.

Mr. GILMAN.—I think it is only fair, if you claim anything from any such conversation, that you should ask the captain if he stated it, detailing the conversation, as he is going away.

Q. (By Mr. GRIGGS.) Did you ever have any conversation with any captain of any vessel or any of the officers over there in Port Blakeley in which you stated that you were not on deck, on the deck of your vessel until after the collision, until after the crash came, and therefore did not know anything about it?

A. Why, I never, never; I never thought of saying anything of the kind.

Q. These libels that were prepared by your counsel were prepared under your direction, under the information which you gave them?

(Testimony of Charles Edward Fulton.)

A. Yes, sir, under my hurried information, just as quick as I could give it. I don't say that it was as full as this one, but it was just as quick as this one.

Q. That is the original libel? A. Yes, sir.

Q. This one was prepared with more care?

A. Yes, sir, this was prepared according to my log-book,

(Here the counsel and witness refer to the log-book with the blue cover.)

Q. Will you show us about the place where these occurrences are noted in that log-book?

(Here the witness shows the place referred to.)

Q. What is the name of your first officer?

A. Dott.

Q. That is your first mate? A. Yes, sir.

Q. And the second mate? A. Stevenson.

Redirect Examination.

Q. (By Mr. GILMAN.) Captain, they ask to see your log-book. I will ask you whether this is your log (showing)? A. Yes, sir.

Q. The entries there are made by yourself?

A. Yes, sir.

Q. And when made?

A. I think they were made on Monday, I think it was, just shortly after the accident, anyway.

Mr. GILMAN.—I would like to read the entry in this log-book in evidence.

(Testimony of Charles Edward Fulton.)

Mr. GRIGGS.—We make the objection that it is irrelevant and immaterial, and does not tend in any way to bind the respondent and claimant, but we have no objection otherwise to the substitution of a copy or of the reading of the log in evidence, in place of the original.

(Here the log is read in evidence as follows:)

"April 14th, 1900. Puget Sound. At about three hours 45 minutes A. M., while in tow of the tug 'Tyee' when off Point No Point we observed steamer's lights which afterwards proved to be the steamer 'Lakme' of San Francisco, about two degrees on our port bow. A few moments after our tug gave two blasts with its whistle which was immediately answered by the approaching steamer, two blasts. Our tug at once starboarded his helm and our helm was also starboarded to follow tug. The tug was noticed to be going to port very fast and our helm was ordered by master to be put hard-astarboard. The approaching steamer did not seem to alter her course to port but came directly between our tug and ship, struck us a very heavy glancing blow on the port bow, damaging several plates, carrying away port boom guy cathead fastenings and sundry damage to forecastle rail. The towing hawser was on the starboard bow and some way fouled our starboard anchor which was hanging by cat and fish tackle, carrying away cat stopper and bending fish davit down to deck, and breaking deck castings that davit ships through and sundry other damage to blocks, etc. Our sidelights were burning brightly and a proper lookout on the forecastle deck.

(Testimony of Charles Edward Fulton.)

The master was in charge of deck and was there at and before collision."

Q. (By Mr. GILMAN.) Now, Captain, in reference to the is first libel prepared, was that prepared very hurriedly? A. Yes, sir.

Q. No time for consultation or examination of it?

A. No, sir.

Q. But you found that in preparing your new libel that some statements made in the first libel were incorrect?

A. Well, your partner told me so. I did not look over it. He told me there was a mistake there.

Q. What was the occasion of the haste in preparing it? A. He said—

Q. The first time?

A. The first time he said that there was some mistake about the way the helms were put.

Q. What was the occasion of the hurry the first time the libel was prepared?

A. I got word from Tacoma that she was sailing that night.

Q. And it was in order to libel her before she would leave port?

A. In order to libel her before she would leave port.

Mr. GILMAN.—I would like to add to that reading from the log as followes:

"Signed, CHARLES E. FULTON, Master.
JNO. F. DOTT, Mate.
CONRAD BERG, Wheelman.
O. JOHNSON, Lookout man."

(Testimony of Charles Edward Fulton.)

Q. I will ask you if there was any necessity for any crew on deck other than the crew you had?

A. No, sir.

Q. And the officer in charge and the lookout man and the wheelman? A. No, sir.

Q. Is that the usual crew when a ship is in tow?

A. On the sound? Yes, sir.

Q. Now, when a ship is in tow of a tug, who selects the course? A. The tug.

Q. And the ship in tow does what, simply?

A. I beg your pardon?

Q. What does the ship in tow do?

A. She follows the tug.

Q. Could any other course be pursued—this tug could not go on one course and the ship an another?

A. No, sir.

Recross-Examination.

Q. (By Mr. GRIGGS.) You say you think that that log which you have identified was made up on Monday. Now, to refresh your recollection, I will ask you to state whether or not it was made up after you came to Seattle?

A. Oh, no, sir. That log was made up before Captain Pope did the surveying. I remember that perfectly well, and he was there on Monday and I must have written it up before.

Q. He was at Port Blakely on Monday?

A. Yes, sir, he was at Port Blakeley on Monday. I

(Testimony of Charles Edward Fulton.)

came over I think on Tuesday I came over—that log will tell you.

Q. Was it made up before or after you had your consultation with your proctors with reference to filing the libel?

A. It was made up—it must have been made up afterwards—I must have made it up, because it was made up before Captain Pope come over, and he came over on Monday.

Q. It was made up after you had your consultation with your attorneys about filing the libel?

A. It was made up before that. The libel was filed on Monday.

Q. When did you have your first consultation with your attorneys? A. On Monday.

Q. That was the first time you had any consultation with them? A. Yes, sir.

Q. Then this was prepared before that, was it?

A. Yes.

Q. It was prepared before that? A. Yes.

Q. I wish you would examine the log and state what was the last entry preceding the entry which you have just identified (showing log to witness).

A. The last entry—that must be the last entry, the desertion.

Q. When was the last entry which appears in your log preceding the entry which you have identified, when was it made?

(Testimony of Charles Edward Fulton.)

A. That entry was made on March, the 5th, this one (showing).

Q. 1900, you mean?

A. This was on last March, in Shanghai, this entry (showing).

Q. You have added nothing to the log since?

A. No, sir. I don't put anything there but just an occurrence like desertions and collisions, in this log. That is the ship's log there (showing another log to counsel).

Q. Did you have your log with you when you consulted with your attorneys?

A. No, sir. I think this is the first time Mr. Gilman ever saw the log.

Mr. GRIGGS.—Without waiving the exception to the introduction of the log, I wish to ask the captain whether there was any other log or report or record kept of the collision referred to, other than the log which he has read.

A. There was the ship's log and my official log.

Q. I now show you a book marked "Log-book of 'Queen Elizabeth,'" and turn to the entry which is headed "Saturday, April 14, 1900," I call your attention to a signature at the bottom which appears to be "Charles E. Fulton," and ask you whether that is your signature?

A. Yes, sir.

Q. Also on the opposite page? A. Yes, sir.

Q. And is the signature on the left of yours in each case the signature of your mate, John F. Dott?

(Testimony of Charles Edward Fulton.)

A. Yes, sir.

Q. In whose handwriting is that entry?

A. In his.

Q. That is your mate's? A. Yes.

Q. Do you know when that entry was put in there by the mate?

A. I think he must have put it in on Saturday or Sunday; I don't know when he put it in, but I reprimanded him for doing so. I said, "Why didn't you come to me before you fixed your log up, because you were not on deck." He said, "I got it from the boys that were there. Do you see?" I said, "You should have come to me."

Q. When did you sign this log?

A. I signed that log after he made it up. I forget whether it was the Monday or Tuesday, or when it was, but I signed it. I forget exactly when I signed it.

Mr. GRIGGS.—I will ask the privilege of introducing this in evidence and reading it in connection with the log which was read by the libelant. (Reading:) "Saturday, April 14, 1900, 1 A. M. Called all hands and started to heave short; tug "Tyee" alongside. 2 A. M., hove up anchor and proceeded in tow for Port Blakeley. At 4 A. M., sighted a steamer, red and masthead lights nearly ahead, on seeing which our tug blew two short blasts and was answered similarly by the other vessel who failed to alter his course in accordance with the signal he made; the consequence being that he struck us a hard, glancing blow on the port bow, carrying away

(Testimony of Charles Edward Fulton.)

bowsprit guys, smashing the band and starting port cathead and bending the ship's side in several places and through our towing hawser, getting foul of the starboard anchor, the anchor davit was smashed level with the rail; forecastle rails bent; anchor stopper carried away." And then from the next page—the bottom of that entry is signed "John F. Dott, mate; Charles E. Fulton, master"; and below that "See opposite page." Then continuing on the next page, "Log of the 'Queen Elizabeth' at Port Blakeley. Dated Saturday, April 14, 1900, and a cat block broken. Both before and after the collision our sidelights were burning brightly. Name of colliding schooner found to be 'Lakme,' a coasting steam schooner. 7 A. M., dropped anchor at Port Blakeley in six fathoms. 9 A. M., got six men from shore to trim ballast, shift the ship. 2:05 P. M., warped ship up harbor to loading berth alongside of bark 'Snow & Bridges' of San Francisco; made fast with good wire springs aft and twenty-five fathoms cable on port anchor. 6 P. M., watchman on duty and mooring secure. Burd, A. B., watchman. Midnight; light breeze and fine, clear weather." This is got off of the opposite page and is one day's log. Signed, "John F. Dott, mate. Charles E. Fulton, master."

Q. The book from which this last entry was read is familiar to you? A. Yes, sir.

Q. You have seen it before? A. Yes, sir.

Q. Do you know whether or not it is a book which the mate is in the habit, and has been in the habit of

(Testimony of Charles Edward Fulton.)

making regular entries of the transactions connected with the ship? A. Yes, sir.

Q. It is a book, is it not, in which the transactions are entered daily? A. Yes, sir.

Q. You spoke of reprimanding the mate for making up that log; I suppose you mean you reprimanded him at the time you signed it?

A. When he brought it up to me to the chart house, that was, I think he brought it up on Monday.

Q. And that was the time you signed it?

A. I generally sign the log every Saturday, once a week, he brings it to me; that is the usual way of signing the log every Saturday. And that was made up before Captain Pope was on board the ship, and Captain Pope came over on Monday. I told him he should not have made up the log without letting me know, because he was not there on deck and he only made it up from what he was told. Of course, he has got it all right.

Q. Well, that is the way the mate usually made up his log; he makes up the log and presents it to you to sign?

A. Every Saturday at sea—I look over it and sign it.

Q. And that is what you did in this case?

A. In this case he handed it in to me, because Captain Pope, the surveyor wanted to see it.

Q. And you looked it over and signed it and that was the time you reprimanded him?

A. I reprimanded him afterward. Captain Pope wanted to see the log for the survey of the ship.

Q. Did you have any other conversation with the mate

(Testimony of Charles Edward Fulton.)

as to what other parties he received his information from when he made up the log? A. No, sir.

Q. Did you talk to the mate before about it?

A. Not a word, no, sir.

Q. (By Mr. GILMAN.) As I understand you, Captain, you did not reprimand the mate for his not having made up the log correctly, but because he undertook to make it up in a matter in which you alone had knowledge, without consulting you?

A. Yes, sir, that is what I mean.

Q. In order that the Court may understand these logs: The last log read from is the daily record which is kept by the mate and approved by the master.

A. Yes, sir.

Q. The first log that was read from is the official log; now, is that a daily record? A. No, sir.

Q. What is entered in that log?

A. Collisions and insubordination of crew, desertions, and things of that kind; that is about all.

Q. That is, some important events?

A. Yes, sir, important events.

(Testimony of witness closed.)

CONRAD BERG, produced as a witness in behalf of libelant, being first duly sworn, testified as follows:

Q. (By Mr. GILMAN.) How old are you?

A. I am twenty-six years old.

Q. Are you a sailor? A. Yes, sir.

Q. How long have you been a sailor?

(Testimony of Conrad Berg.)

A. I have been a sailor since the 4th day of April, 1887.

Q. Been going to sea all the time since 1887?

A. I have been in the navy, six years and eight months and fourteen days out of that time.

Q. In what navy? A. In the Swedish navy.

Q. You are now a sailor on what ship?

A. The "Queen Elizabeth."

Q. And what is your position on the "Queen Elizabeth"?

A. Able seaman and boatswain's mate.

Q. Were you on the "Queen Elizabeth" on the 13th day of April, last? A. Yes, sir.

Q. At the time of the collision with the "Lakme"?

A. Yes, sir.

Q. What were you doing at that time?

A. I was standing at the wheel at the time.

Q. Who was on deck?

A. The captain was in charge of the ship and able seaman Johnson was on the lookout.

Q. Now, what time did you leave Port Townsend?

A. I could not say exactly what time, but it was something about one o'clock.

Q. And when did the mate and the rest of the crew go below?

A. After we had hove the anchor the mate and the rest of the crew went below.

Q. Did you notice the tug when she came alongside?

A. Yes.

(Testimony of Conrad Berg.)

Q. I will ask you what lights she had?

A. She had two, masthead light, and she had a red and green light and the stern light.

Q. Do you know what the two lights indicated, the masthead lights?

A. Yes, sir; two masthead lights.

Q. Do you know what they are for?

A. Yes, sir, to show that they were going to tow.

Q. And what sort of a light did she have behind?

A. A bright light.

Q. Do you remember the collision? A. Yes, sir.

Q. When did you first see the vessel "Lakme"?

A. The first I saw of the vessel was a bright light ahead, and shortly after I noticed a red light and a little after that I heard our tug give two blasts, and he was immediately answered by the approaching steamer with two blasts, and our tug starboarded her helm and went to port, and I was steering after the towboat, and starboarded my helm too, and shortly after that I heard the Captain holler out, "Hard-aport," or "hard-astarboard." So the steamer came up between the towboat and us and struck us on the port bow, and as she struck us—as the steamer struck us on the port bow, after she struck us on the port bow she shot over toward the land, right headed over.

Q. Now, could you see the approaching steamer all the time?

A. Yes, sir, I could see her. I can't say how far she

(Testimony of Conrad Berg.)

was from the ship, but then she came close up to the ship, and I only could notice her masthead light.

Q. State whether or not you ever saw her green light?

A. No, sir, I never saw the green light.

Q. Now, as I understand you, when the tug starboarded her helm you starboarded your helm?

A. Yes, sir, because I had orders to steer after the towboat.

Q. And then afterward you got the command "hard-astarboard"? A. Yes, sir, hard-astarboard.

Q. Did you put the wheel hard-astarboard?

A. Yes, sir.

Q. How long was that before the steamship struck you? A. I could not say how long it was.

Q. Now, Mr. Berg, at the time you were struck were you following the tug, directly in line with the tug?

A. When the vessel struck us the towboat was a little more on the beam, because we could not swing so fast.

Q. That is, you had not got swung fully around?

A. No.

Q. Now, after she struck you this glancing blow, how was the "Lakme" heading?

A. She was headed for the land, for the land we had on the port quarter.

Q. She was headed for land on the port quarter?

A. Yes, sir.

Q. How did she lay in reference to your vessel?

A. She was lying like that (showing).

(Testimony of Conrad Berg.)

Q. Do you know how you were heading at that time?

A. We had the shore light right to stern and the land we had astern, and we had land ahead.

Q. The "Lakme," that is the vessel that struck you, after she struck you this blow was headed toward the land on your port quarter?

A. On the port quarter, yes, sir.

Cross-Examination.

Q. (By Mr. GRIGGS.) How long did you continue on what you call your starboard course—that is, after you noticed the tug was swinging and after the whistles were blown and the tug was swinging to starboard, how long did you continue that course before the captain ordered "hard-astarboard"?

A. It was not very long. I just had started to starboard my helm and as soon as I starboarded my helm the captain gave the order "hard astarboard."

Q. Immediately?

A. Yes, sir. When the towboat started to go over to port a little bit more and then I got the order.

Q. Were you watching the "Lakme's" lights closely?

A. Yes, sir, I was watching them—first, I could see the light ahead and there was a bright light, and I thought at first it was a shore light, but afterward I saw the red light, and so I was watching her coming down.

Q. You noticed a light at Point No Point, as you passed it?

A. Yes, sir, I noticed the shore light.

(Testimony of Conrad Berg.)

Q. How long was it after you had passed Point No Point light that the collision occurred, or that you noticed the "Lakme"?

A. I could not say the time or the distance.

Q. About how long?

A. I never took any special notice of it. We were past it something about—we were over a mile past it.

Q. Past Point No Point?

A. First when I noticed the light we were not up to Point No Point; when I noticed the "Lakme" light; then we were not up to the shore *night* yet; then when I noticed the sidelights then we were about abreast of it.

Q. Do you know what course you were going with reference to the shore line at the time you were watching the "Lakme's" lights?

A. I didn't steer any course at all. I had the orders to steer after the tug.

Q. You were following the tug? A. Yes, sir.

Q. Did you notice how far away from the shore you were at that time?

A. The shore we had on the starboard side was a mile or a mile and a half off.

Q. Now, do you remember whether you were following down along the shore about parallel with the shore line?

Mr. GILMAN.—He doesn't understand what "parallel" means.

Q. (By Mr. GRIGGS.) Were you following down about the same distance from the shore line all the time?

A. Yes, sir, very near.

(Testimony of Conrad Berg.)

Q. Well, could you tell whether the "Lakme" was nearer the shore than you were or farther out into the sound?

A. When I first noticed her she was farther out into the sound, because I saw her on the port bow.

Q. Your wheel was right in the center of your ship?

A. Yes, sir.

Q. And about how far on your port bow did you see the "Lakme"? A. About two degrees.

Q. Have you any idea whether, from the position of the "Lakme's" light, whether the reason you could not see the "Lakme's" green light was that her course lay to the left of you so far that you could not see it, or whether it was not burning?

A. I never noticed any green light. I never noticed any green light on board.

Q. From the position of the boats do you think you would have been able to see it if the light had been burning?

A. No, sir, not at the time I noticed her first.

Q. Her course laid so far across yours that you would not hardly have seen the green light at all?

A. Not at first, but then when she came closer, it might be that I should have seen it then.

Q. Now, did you notice the "Lakme" as it approached the tug particularly, were you keeping watch of the position and of the distance the "Lakme" was away from the tug all the time?

(Testimony of Conrad Berg.)

A. No, sir, I did not watch the steamer much. I had to watch the towboat and look out for the steamer too.

Q. Now, when did you put your helm to starboard?

A. As soon as the tugboat had given the two blasts they starboarded their helm and went to port and I starboarded my helm directly.

Q. At the same time? A. Yes, sir.

Q. How much difference was there between your course when you were directed to starboard, and when your course was directed hard-astarboard, what was the difference in the number of points or degrees between starboard and hard-astarboard?

A. I could not say because I never looked in the compass. I was looking at—I had to follow the tug.

Q. You say that the tug was swinging faster to the starboard than you did?

A. It went faster to port than we did.

Q. You noticed that the tug swung faster to port than you did?

A. Yes, sir, and then I got order from the captain "hard-astarboard."

Q. You noticed that the tug was swinging faster to port than you, before the captain ordered you "hard-astarboard," is that what you mean?

A. The towboat had given two blasts and they went to port; they starboarded their helm and went to port, and I followed her and she was swinging faster than our ship, and it might be that she was over on the port—she must have been over on the port bow when I got the order "hard-astarboard."

(Testimony of Conrad Berg.)

Q. Did you notice whether the tug was continually moving or whether it had stopped its engine?

A. The tugboat stopped the engine when the steamboat came closer down to us, the tugboat stopped.

Q. The tugboat stopped? A. Yes, sir.

Q. Did you notice how close the "Lakme" was to the tug when she came by you, when she missed the tug?

A. No, sir, I didn't notice that.

Q. Have you any idea or do you remember whether it was thirty feet or forty feet or a hundred feet?

A. So far as I could see she was closer to us than she was to the tugboat.

Q. The "Lakme" was? A. Yes, sir.

Q. Did you hear the captain order the crew on deck?

A. Yes, sir.

Q. When was that he ordered the crew on deck?

A. When the captain could see that the steamer was not going to get clear of us he sung out "All hands on deck!"

Q. Now, do you remember where the "Lakme" was when he gave that order?

A. It might be that she was a ship's length off from us.

Q. She was up about as far as the tug or not quite?

A. She was closer to us then.

Q. She was already closer to you? A. Yes, sir.

Q. How long was that before she struck you?

A. It was a very short time from the time we got the order for all hands on deck until the time the steamer struck us, was a very short time.

(Testimony of Conrad Berg.)

Q. Have you any idea about how far the vessels were apart when the four whistles were blown?

A. It must be that it was between two and three miles.

Q. And how long had you been watching the "Lakme's" light before the whistle blew?

A. It was not so very long between the time I saw her light and the whistle, when the tug began to blow the whistle.

Q. About how long?

A. I could not say; it was a very short time.

Q. When your vessel was at Port Townsend, before you left there with the tug, was the crew on shore at all?

A. There was some of the crew that ran away and left in Port Townsend, and some others was standing by the ship.

Q. Did the crew go on shore at all while they were lying at Port Townsend? A. No, sir.

Q. They didn't?

A. No, sir; we were not ashore, never ashore.

Q. Never ashore? A. No, sir.

Q. How did those fellows desert; did they drop off the ship and swim in to shore?

A. The boarding-house master took them over in a boat, at the time they arrived.

Q. And none of the rest of the crew went on shore at all while you were there?

A. The captain was ashore.

Q. None of the rest of the crew?

A. None of the crew.

(Testimony of Conrad Berg.)

Q. Now, when you first saw the "Lakme," you say you first noticed her masthead light particularly?

A. Yes, sir, a bright light.

Q. And a little later you saw her red light?

A. A little later I saw her red light.

Q. And at that time you were following your tug directly right in line.

A. Yes, sir, right after her, with the towboat on our starboard bow. Of course we had the tow-line fast on the starboard side, on the forecastle head.

Q. Then you could see the "Lakme," you mean on the port, to the left of the tug?

A. Yes, sir, I could see her over the port bow very nearly ahead.

Q. You said that just after the collision, or when was it, before or after the collision, that you had the land astern of you and also land ahead of you?

A. Just after the collision and at the time of the collision; at the time the collision happened, then we had the land on the quarter then; we had swung out that much.

Q. Can you tell how close you were to the land on your port side at that time?

A. On the port side, the land we had on the port quarter directly astern was over a mile or a mile and a quarter then.

Q. That was on your port quarter from your bow, you mean?

(Testimony of Conrad Berg.)

A. No, from the stern; and the other land ahead I could not say how far that was ahead.

Q. So that directly after the collision you noticed this, that you had land both at the bow and at the stern?

A. When we stopped to swing to go to port, we got the land then ahead and the other land come up on the quarter, we were going along with the land and then we got it on the quarter and we got the other land ahead.

Q. Did the captain give you any orders at all with reference to steering until he ordered you "hard-astarboard"?

A. I had orders from the captain when we left Port Townsend to steer after Port Townsend, to keep the tug on the starboard bow.

Q. At any time immediately prior to giving the order "hard-astarboard," did he give you any special directions?

A. Except to follow the tug and when the tug went to starboard then I starboarded the helm.

Q. Did the captain order you to starboard?

A. Yes, sir.

Q. He ordered you to starboard your helm?

A. Yes, sir.

Q. And then he gave you another order "hard-astarboard"? A. Yes, sir, "hard-astarboard."

Q. Now, how far apart were those two orders?

A. Well, it was not long; it was a very short time. I could not say as to the time.

Q. How long after the order "hard-astarboard" did he call the crew on deck?

(Testimony of Conrad Berg.)

A. Then he gave the order "all hands on deck."

Q. How soon after he ordered you "hard-astarboard" was that? A. Shortly after.

Q. What do you mean by shortly, immediately, or was there a minute or two minutes or three minutes?

A. I could not say as to the time.

Q. When did the excitement about the collision develop? Was there any excitement at the time he ordered "hard-astarboard"?

A. No, sir, there was no excitement, except I heard the captain say, "What is he going to do?" saying what the steamer, what he was going to do; and then he sung out "All hands on deck."

Q. Was that before or after he ordered you "hard-astarboard"?

A. That was after the "hard-astarboard."

Q. What remark was it that he made about what the steamer was going to do—did he make the remark to you?

A. No, sir, he was not close to me. The captain was standing in the port side on the poop.

Q. Do you remember exactly what he said?

A. No, sir, I heard the captain say, sing out, "What are you trying to do?" or something like that, but the words I could not say.

Q. Did he sing it out to the steamer or to the tug?

A. I don't know who he was singing out to.

Q. Was he talking out loud as if he was talking to somebody, or just muttering it to himself?

A. He was talking loud.

(Testimony of Conrad Berg.)

Q. As if he wanted to make someone hear?

A. Yes, sir.

Q. At that time was there anybody on deck besides yourself and the lookout? A. Me and the lookout.

Q. How far away was the lookout?

A. The lookout was up on the forecastlehead.

Q. How far away was that from you, how many feet?

A. I don't know how long the ship is.

Q. The captain said it was two hundred and fifty feet over all, was he clear at the further end?

A. Yes, sir, he was right at the forward end, right at the forecastlehead.

Q. Did the captain call out, "What are you going to do?" or whatever it was he remarked, before he ordered "hard-astarboard," or after; do you remember that?

A. It was at the time he ordered "hard-astarboard."

Q. What I want to get at, is your recollection definitely, if you can give it to us, about just how those orders came to you, or just how the captain said it, that is what I want; you say you think you heard the captain make this remark, "What are you going to do?" about the same time he gave you the order "hard-astarboard"; now, do you remember whether it was before or after; can you fix it?

A. No, sir, I am not sure whether it was before or after. Of course I never took any notice of it.

Q. Did the captain say anything else; did he call out to the steamer or to the tug?

A. I don't remember that.

(Testimony of Conrad Berg.)

Redirect Examination.

Q. (By Mr. GILMAN.) The captain did not say "What are you trying to do?" or "What are you going to do?" to anybody on board his own ship, did he?

A. Nobody was aboard.

Q. He didn't say that to you or the lookout?

A. No, sir, the captain never said anything to me except to give me the orders.

Q. Now do you recollect whether the captain gave you an order to starboard or whether you starboarded yourself when you saw the tug fall off?

A. When the tug altered her course I followed the tug and then the captain said "starboard."

Q. And then said "hard-astarboard" immediately afterwards? A. Hard-astarboard.

Q. Immediately afterwards?

A. It came very nearly.

Q. You starboarded your helm before he gave you any order at all? A. Yes, sir.

Q. How long did you keep your helm to starboard?

A. It was a good time I had my helm to starboard.

Q. Do you remember when you put it to port again?

A. Then after the collision the captain on the tug was singing out, "hard-aport" for to get the ship head up.

Q. Then you kept your wheel starboarded until the captain of the tug said to port it, in order to pick you up?

A. Yes, sir.

Q. Now, just before the captain gave the order "All hands on deck" did you see the steamship "Lakme"?

(Testimony of Conrad Berg.)

A. Yes, sir.

Q. Where was she? A. I saw her masthead light.

Q. Where was she? She was on the port bow.

Q. Coming right straight ahead?

A. No, sir, not ahead; she was a little in on the port bow.

Q. Did you at any time see her starboard light from the time you first sighted her until the collision?

A. No, sir, I never noticed her green light.

Q. Now, was the captain on deck all the time from the time you left Port Townsend until the collision?

A. Yes, sir, the captain was walking the poop all the time.

Recross-Examination.

Q. (By Mr. GRIGGS.) Were you at the wheel from the time you left Port Townsend?

A. Yes, sir, I was at the wheel from Port Townsend to Port Blakeley.

Q. Nobody else took the wheel?

A. There was a man relieved me after the collision.

Q. That was after the collision?

A. After the collision. Then I struck the bell that I wanted to be relieved to go forward.

Q. How far away was the tug when you heard the call from the tug hard-aport after the collision; how far apart were you?

A. We were not very far apart then from the tug.

(Testimony of Conrad Berg.)

Q. About how far; as far away as your tow-line?

A. The tow-line was broke and the steamer was lying in the other direction.

Q. How far were you away from the tug when you heard the captain say "hard-aport"?

A. I don't know how far. She was not very far off.

Q. Ten or a hundred or six hundred feet?

A. It must be that she was a ship's length.

Q. How far is that? Two hundred feet or six hundred feet, or about your ship's length, do you mean?

A. Yes.

Q. Did you hear anything said by any of the officers or crew on board either the "Lakme" or the tug just before the collision happened? A. No, sir.

Q. You didn't hear anything at all?

A. No, sir, I didn't hear anything at all.

Q. After the whistles were blown on the "Lakme" and the tug, could you tell from the way the red light on the "Lakme" ranged with the masthead light whether she was swinging to port or to starboard?

A. I never saw her alter her course at all.

Q. You didn't see her alter her course at all?

A. No, sir.

Q. She came all the time directly straight on?

A. Yes, sir. She came straight on us all the time.

(Testimony of witness closed.)

OSCAR JOHNSON, called as a witness in behalf of libelant, being first duly sworn, testified as follows:

Q. (By Mr. GILMAN.) You are a sailor?

A. Yes, sir.

Q. How long have you been a sailor?

A. Fourteen years.

Q. On deep water ships? A. Yes, sir.

Q. You are now a sailor on the "Queen Elizabeth"?

A. Yes, sir, for eight months.

Q. Where did you ship on her?

A. New York.

Q. You were on her at the time she had a collision with the "Lakme"? A. Yes.

Q. What were you doing?

A. I was keeping the lookout.

Q. Where were you on the lookout?

A. On the forecastle head.

Q. And were you there when the ship left Port Townsend? A. Yes, sir.

Q. Now, who was on deck at that time?

A. The captain was on the poop and I was on the forecastle head, and the man at the wheel.

Q. The others were below? A. Yes, sir.

Q. Was the captain on deck all the time from the time the ship left Port Townsend? A. Yes, sir.

Q. Did you see the tug when she came along to take you in tow? A. Yes, sir.

Q. What lights did she have?

A. When she was alongside she had two white lights up and a white stern light.

(Testimony of Oscar Johnson.)

Q. Now, how did your ship steer in reference to the tug?

A. She steered very well; she steered right square behind.

Q. Right straight behind the tug?

A. Yes, sir.

Q. Now, when you got down from Port Townsend did you see any other steamer's light? A. Yes, sir.

Q. How far away? A. I could not tell you.

Q. What lights did you see?

A. Masthead lights.

Q. What other lights? A. And a red light.

Q. Did you ever see her green light?

A. No, sir.

Q. Where was she, on your port bow or starboard bow, or directly ahead? A. Port bow.

Q. How much on the port bow?

A. I could not tell that, because I have got no compass.

Q. She was on your part bow and you could not see her green light? A. No, sir.

Q. Did your tug give any signal? A. Yes, sir.

Q. What signal? A. She gave her two blasts.

Q. Did the other steamer give any signal?

A. Yes, sir, she answered the two blasts.

Q. Did your tug then change her course?

A. Yes, sir, to port.

Q. What did your ship do then?

A. She followed the tow.

(Testimony of Oscar Johnson.)

Q. Did you see the other vessel change her course?

A. No.

Q. Now, go on and tell what you saw after that and what happened after that.

A. Well, she came right along in the same course as she had all the time, at the time I saw her, she came right along down on our bow, and our towboat was going to port, and she slipped over the towing hawser—she must have got foul on our starboard anchor, and the Captain sings out, "All hands on deck!" So I jumped down from the forecastlehead and called the men to the forecastle, and when I walked from the forecastle she struck our bow.

Q. What lights did you have that night?

A. We had a bright green and red light.

Q. Were they burning all the time?

A. Yes, sir.

Q. You were forward of those lights, were you?

A. Yes, sir.

Q. And you know that they were burning all the time, do you? A. Yes, sir.

Q. Brightly? A. Yes, sir.

Cross-Examination.

Q. (By Mr. GRIGGS.) You say that the captain sang out "All hands on deck!" and you gave the order to the forecastle—you jumped down to the forecastle?

A. Yes, sir, I went down from the forecastlehead.

Q. You went down the stairs?

(Testimony of Oscar Johnson.)

A. The house is on deck abreast the fore rigging, and I was in the forecastle when she struck.

Q. You hadn't come back on deck at the time she struck?

A. No, sir, I hadn't come out when she struck; I didn't see *she* struck.

Q. You were still inside when she struck?

A. Yes, sir.

Q. How soon after the captain ordered all hands on deck did you go down to the forecastle?

A. Yes, sir, I went back.

Q. Just as soon as he ordered all hands on deck did you go right in?

A. Yes, sir, I jumped down and called the men in the forecastle.

Q. And then just immediately after the vessel struck?

A. At the same time that I was in there, opening the door, she struck.

Q. How far away was the "Lakme" when you heard the captain give that order, how far away from your boat.

A. I could not tell, but I jumped down from the forecastlehead to the forecastle.

while she was towing? A. It was a short tie.

Q. Do you know how far your tug was away from you

Q. You were standing on the lookout and you could see the tug ahead all the time? A. Yes, sir.

Q. And you saw the tug ahead all the time from Port Townsend? A. Yes, sir.

(Testimony of Oscar Johnson.)

Q. Now, when the captain gave the order "All hands on deck!" was the "Lakme" about as far away as the tug had been when she was towing you, or was she farther?

A. She was not very far away, the steamer.

Q. She was about the same distance away that your tug was? A. No, sir.

Q. Was she farther or closer? A. Closer.

Q. She was closer? A. Yes, sir.

Q. Did you notice how far apart your tug and the "Lakme" were when the "Lakme" passed the tug.

A. No, sir, I could not tell.

Q. Do you know whether it was thirty feet or a hundred feet. A. I could not tell.

Q. Did you notice that at all? A. No, sir.

Q. You say the tug was on your port?

A. Yes, sir.

Q. How much on your port, could you tell?

A. I could not tell.

Q. When you were coming up the sound in tow and when you saw the lights of the "Lakme," the masthead and the red light, you say you saw it on your port bow?

A. Yes, sir.

Q. Now, about how far on the port bow was that?

A. Well, I could not tell how far it was on the port bow, because I had no compass.

Q. You could tell me about how far?

A. About two degrees, or three degrees—two degrees, I expect.

(Testimony of Oscar Johnson.)

Q. You were following the tug exactly, were you, at the time? A. Yes, sir.

Q. Now, could you see the "Lakme's" masthead light and red light to the left of the tug as you looked ahead or to the right? A. I saw it ahead on the left side.

Q. On the port side? A. Yes.

Q. How far over the tug's port could you see the "Lakme," or did you look—how much over the tug did you look in order to see the "Lakme"; do you remember that?

A. No.

Q. Did you see the "Lakme" diagonally across the sug?

A. I saw the white light and the red light out on the steamer on the port bow.

Q. And the tug was directly in front of you?

A. Yes, sir.

Q. Do you know about how far away the "Lakme" was when you saw the white light first?

A. Well, I could not tell the distance.

Q. Do you remember whether you had gotten past Point No Point light at that time, or were you abreast of it, of where were you? A. I don't understand.

Q. Do you know where Point No Point light is?

A. A bright light—I was standing amidships.

Q. When you first saw the "Lakme's" light?

A. Yes, sir.

Q. How far beyond the lighthouse had you gone before the collision occurred?

(Testimony of Oscar Johnson.)

A. Well, I could not say how many minutes it was—ten minutes.

Q. Ten minutes? A. About ten minutes.

Q. How long after you first saw the lights of the "Lakme" was it that the tug blew the two whistles?

A. A short time; it was not long.

Q. How long before the collision happened was the whistle blown? A. How long before—

Q. How long before?

A. It was not a long time. It was a short time.

Q. Have you any idea about how far apart the "Lakme" and the tug were at the time the whistles were blown? A. No, sir, I don't know.

Q. Now, can you tell about how far the tug changed its course to port, how many degrees when it blew its two whistles? A. Which boat?

Q. The tug.

A. I could not tell how many points she was away.

Q. About how far did she swing to port?

A. She was a good deal out to port.

Q. Would she be what you would call hard astarboard or less than that? A. Hard astarboard.

Q. Did you hear the captain give any orders then, all hands on deck? A. No, sir.

Q. How far were you from the shore when you first saw the "Lakme's" light?

A. Well I could not exactly say, but a mile and a half, I should think, or so.

(Testimony of Oscar Johnson.)

Q. Could you tell whether the "Lakme" was a little farther out in the sound or a little nearer the shore at that time? A. No, sir. She was in the sound.

Q. A little further out in the sound?

A. Yes, sir.

Q. Do you know about how fast you were going at that time?

A. No, sir, I could not say that. I don't know.

Q. Were you going at a pretty good rate of speed?

A. About five knots an hour, I should think.

Q. Did you hear the captain give any orders to the wheelman to starboard and hard astarboard?

A. I didn't hear.

Q. Did you hear the captain say anything to somebody on the other ship or on the tug, or on the "Lakme"?

A. No.

Q. "What are you doing" or "trying to do"?

A. No, sir.

Q. You didn't hear him?

A. I heard him say, "What are you trying to do"?

Q. When did he say that?

A. When she just passed by us, after the collision.

Q. That was after the collision?

A. Yes, sir, as she passed by and was going for the other land.

Q. You had come up on deck immediately after the collision, and you heard him say that?

A. Yes, sir, I was on the main deck.

Q. Who else was up on deck then?

(Testimony of Oscar Johnson.)

A. The carpenter, the second mate, and the mate and the men in the forecastle.

Q. What ship were you on before you went on the "Queen Elizabeth"?

A. I was in the steamer "Hevalias" belonging to Liverpool; she goes under the Belgian flag.

Q. How long were you with that ship?

A. Two months.

Q. And before that?

A. Down at "Donafrancisca."

Q. How long were you with that vessel?

A. Thirteen months; she belongs to London.

Q. Had you ever been in the Puget Sound waters before? A. What?

Q. Did you ever come down from Port Townsend to Seattle before this?

A. Yes, I have been up to Portland, Oregon.

Q. Where?

A. To Portland, Oregon, but not in this sound.

Q. This is the first time you made this trip?

A. Yes, sir.

Q. Did you pass any other ships from Port Townsend until you had this collision?

A. Yes, sir, there was a small steamer in sight, a towboat.

Q. When did you have that?

A. Between the land and our starboard bow?

Q. When was that?

A. I don't remember whether it was after the colli-

(Testimony of Oscar Johnson.)

sion or before the collision, but there was a towboat in sight I know.

Redirect-Examination.

Q. (By Mr. GILMAN.) Johnson, had the stem of the "Lakme" struck your hawser before you went below to call the men?

A. No, sir, she had not struck our hawser; I didn't see it.

Q. You were below when all that happened?

A. Yes, sir:

(Testimony of witness closed.)

HARRY ADAMS, called as a witness in behalf of libelant, being first duly sworn, testified as follows:

Mr. GILMAN.—Q. You are a seafaring man?

A. Yes, sir.

Q. How long have you been going to sea?

A. Off and on since '76.

Q. You are now on the "Queen Elizabeth"?

A. Yes, sir.

Q. You were on her at the time of the collision with the "Lakme"? Yes, sir.

Q. In what capacity?

A. A. B.—carpenter.

Q. Were you on deck at the time of the collision?

A. No, sir, I was not there.

Q. What was the first thing you heard after this collision?

(Testimony of Harry Adams.)

A. I was lying in my bunk and a shout from the bridge roused me up and I was interested, I thought there was something the trouble with the tugboat, and I heard the captain say, "Where in hell are you going to?" and he turned to the man at the wheel and gave the command, hard-astarboard, and I turned out, and the captain said, "all hands on deck," and as he said that why the collision occurred and I heard the captain say —the captain asked me to run forward and see whether she was struck below the waterline or not, and I did it immediately.

Q. Did you notice the "Lakme" as soon as you got on deck? A. I did, sir.

Q. After the collision? A. Yes, sir.

Q. How was she heading with reference to your vessel?

A. She was heading, well, our vessel stood in this direction (showing), I don't know what point of the compass, but the "Lakme" was going off in this direction (showing), towards a point of land on our port quarter.

Q. The "Lakme" was heading about at right angles with the "Queen Elizabeth"?

Yes, sir, she was heading this way (showing). This is our port bow and this is her bow (showing), it was at an angle, and she laid that way, kind of triangle-shaped, only she was a little this way (showing).

Q. Heading at a little less than right angle?

A. She was this way, she was more to the left—she

(Testimony of Harry Adams.)

was going in that way, kind of a triangular shape from us.

Q. Suppose you put on a piece of paper the direction of the boats?

A. That the "Lakme" stood from us at the time?

Q. Yes.

A. (Witness does so.) That was her position.

Mr. GILMAN.—I will mark the letter L for "Lakme" and the letters Q. E. for "Queen Elizabeth" and I will ask to have that put in evidence and marked as Exhibit "E."

(Document marked as above.)

Cross-Examination.

Q. (By Mr. PETERS.) How long have you been a seafaring man?

A. Off and on, I have not stuck to it, but I made my first voyage in 1876. I worked ashore both in England and America since then, and at times I was at sea.

Q. How long on the "Queen Elizabeth"?

A. Nine months.

Q. Did you voyage from Shanghai?

A. New York to Shanghai and Shanghai to the sound.

Q. Never been in the Puget Sound waters before?

A. Never, sir.

Q. Your bunk was in the forward part of the ship?

A. No, sir, right on the after-deck, within twenty or twenty-five feet of the bridge.

(Testimony of Harry Adams.)

Q. On the aft deck? A. On the after-deck.

Q. How far back of the man at the wheel was that?

A. No, sir, it was forward of the man at the wheel.

Q. Now, the first, as I understand it, that you heard of this collision was when you felt the jar of the shock?

A. No, sir, I was awake some time before that—some seconds, probably, or a minute.

Q. What was it that first called your attention?

A. Something unusual waked me from my sleep and then I heard the captain say, "where in the devil is he going to?" and turned to the man at the helm and say, "put your wheel hard-astarboard." I figured there was something wrong and I slipped out of my bunk. I heard that very distinctly.

Q. Did you hear the captain prior to that?

A. No, sir.

Q. Give an order?

A. I heard none previous to that.

Q. That was really the first thing you heard?

A. That was the first thing I heard.

Q. How long after was it you felt the shock?

A. Well, I have no judgment, because I didn't know what was going to happen. I did not know that there was a collision going to come off—I did not know what was going to happen and I was on the alert.

Q. You could not tell whether it was instantly or quite a while?

A. It was not instantaneously, but I could not recall the time.

(Testimony of Harry Adams.)

Q. Haven't you been on the ship long enough to get some impression of how far the ship would have gone between the time the captain told the man to put the wheel hard-astarboard and the time you felt the shock?

A. No, sir, because I never had anything to do with navigation, I have only been in the steamer in the steward's department and the carpenter's department as I am now.

Q. What brought you on deck was the captain's calling out?

A. The captain's call brought me on deck. I was out of my berth at the time.

Q. You had not got out until the crash came?

A. Yes, sir, I had got up to go to my door when the crash came; I heard the crash and the running down of the yards and things like that.

Q. Did you come immediately on deck?

A. I immediately came on deck and ran to the bottom of the poop ladder and the captain was immediately above.

Q. The captain was above on the poop?

A. On the port side.

Q. Which side of your ship was the "Lakme" when you first sighted her? A. On the port side.

Q. Had she altogether passed your ship at that time? A. She had cleared us.

Q. She was clear of your bow?

A. She was perfectly clear of it then.

(Testimony of Harry Adams.)

Q. About how far do you suppose she was away from the bow?

A. I could not judge, it might have been a hundred yards, or five hundred yards. I never stop to measure distances, I was away forward, I ran forward on the port side.

Q. Where was the tug at this time?

A. She was standing off on our port bow as if she was about to turn.

Q. Which way?

A. Turn to port apparently; she was standing off in that direction, almost the same direction we were at the time, but she seemed to be turning to port. I never noticed her afterward until she was away back.

Q. Did you hear anybody from the tug call to your people on the "Queen Elizabeth" to port your helm?

A. Yes, sir, I could hear the captain of the tug, he said put your helm aport.

Q. Now, how far were you from the land on the port side at the time that you first came on deck at the foot of the poop ladder?

A. On the port side?

Q. Yes.

A. I could not judge. It was just in the gray of the morning and I could not tell the distance; and another thing, I didn't pay any particular attention to it, to tell you the truth, I saw the land perfectly clear right straight ahead of us.

(Testimony of Harry Adams.)

Q. About how far were your quarters from the wheel?

A. I would say from the wheel it was about thirty or thirty-five feet or maybe forty feet I should judge, but the after-deck where my room is, is about twenty or twenty-five feet from the break of the poop, and I should think from the break of the poop is another fifteen or twenty feet, in all about forty feet.

Q. Do you recall what time intervened between the time of the ordering of the captain to the men at the helm, to hard-astarboard, and when he called, "all hands on deck"?

A. I had not turned out on the deck until the captain called "all hands on deck," but I was ready to go because I heard the shouting and it aroused me, and I knew something was going to happen, I knew that, because there was no sails to take in, and I knew there could not be anything of that description.

Q. There was some excitement?

A. No, sir, no excitement, because there was a very few men on board.

Q. Was it not that that disturbed you, when the captain called, "hard-astarboard," there was some little excitement created?

A. No, sir, I am not a very heavy sleeper, and it must have been some order that the captain called out and being so close, and the door always open, it waked me up.

Q. Did the captain call it out in an unusual tone of voice? A. He called it out in a loud voice.

(Testimony of Harry Adams.)

Q. It must have been something unusual to disturb you and to get you out of your berth?

A. It was the call that disturbed me. If there was nothing wrong I knew there would not be anything like that because the captain was walking on the poop and he could easily have called to the man at the wheel very easily.

Q. As it was then, he shouted to the man quite loudly? A. He must have done so.

Q. Now, then, can you tell me how long it was before he ordered all hands on deck, when he called "hard-astarboard"?

A. I could not tell you. I was not looking at the time—it was a very short time.

Q. Did I understand you to say that you got out and began to dress when he called "hard-astarboard"?

A. Yes, sir, I got up and I began to dress when I heard him call that.

Q. And by the time that he had called all hands on deck you ran out?

A. I was about to step out of the room when he called—I pulled on a pair of drawers and my socks, that was all the clothes I put on.

Q. That was all you had to do at the time?

A. Yes, sir.

Q. And you dressed as hurriedly as possible?

A. Yes, sir.

Q. You anticipated something?

A. I anticipated trouble by the unusual command.

(Testimony of witness closed.)

GEORGE STEVENSON, called as a witness in behalf of libelant, being first duly sworn, testified as follows:

Q. (By Mr. GILMAN.) What is your name?

A. George Stevenson.

Q. What is your business?

A. Seafaring.

Q. How long have you been going to sea?

A. Four years and nine months.

Q. And you are on the "Queen Elizabeth"?

A. Yes, sir.

Q. In what capacity? A. Second mate.

Q. How long have you been second mate?

A. Eight months.

Q. Before that you were an apprentice?

A. Yes, sir.

Q. You were on the "Queen Elizabeth" at the time of the collision with the "Lakme"?

A. Yes, sir.

Q. Where were you at that time?

A. I was in my bunk.

Q. Who had charge of the deck?

A. The captain.

Q. How did it happen that the captain had charge of the deck instead of one of the mates?

A. We had been working ballast up to late that night and the captain told us we could go below.

Q. What was the first you heard in reference to the collision?

(Testimony of George Stevenson.)

A. I heard two whistles and then I heard two whistles go in answer, and then I heard the captain say "starboard" and "hard-astarboard."

Q. And then what?

A. And then I heard "all hands on deck" the next thing.

Q. Did you then come on deck?

A. Yes, sir, I was out of my bunk before that.

Q. Had the collision occurred before you reached the deck? A. Yes, sir.

Q. What was the position of the vessels when you reached the deck?

A. The "Lakme" had just about got clear—she had just got clear of us.

Q. How was she heading with reference to your ship at that time?

A. About at an angle of seventy degrees from us.

Q. And she was heading away at an angle of about seventy degrees?

A. Yes, sir, about seventy degrees from the stern.

Q. Could you just place the position of those two vessels as you saw them at that time?

A. (Witness does so.) She was shooting off in this direction (showing).

Q. I will mark "Q. E." for "Queen Elizabeth" and "L" for the "Lakme."

(Document or diagram drawn by witness is marked Libelant's Exhibit "F.")

(Testimony of George Stevenson.)

Cross-Examination.

Q. (By Mr. GRIGGS.) How long have you been at sea? A. Four years and nine months.

Q. Did you ever make the trip on the Sound before?

A. Yes, sir.

Q. On what vessel?

A. On this same vessel the "Queen Elizabeth."

Q. When was that?

A. Very nearly three years ago.

Q. Then the places as you passed were familiar to you? A. Yes, sir.

Q. Did you notice when you were on deck after the collision, did you notice about where Point No Point was?

A. Yes, sir, right astern, just a little on the port quarter.

Q. About how far astern would you say?

A. I have no idea how far astern it was. I noticed the light but I didn't take any notice of the distance.

Q. It was quite aways?

A. Yes, sir, it was a good ways off.

Q. Do you remember, or can you give us any idea, about how far you were south that is, this way, from the light?

A. As near as I can judge, between a mile and two miles from the point down towards Seattle away from the point.

Q. And about how far away were you from the shore directly opposite the starboard shore?

(Testimony of George Stevenson.)

A. I could not say how far off—we were a good distance off, though.

Q. Where was your bunk with reference to the wheel?

A. With reference to the wheel it would be about twenty feet in front of the wheel.

Q. Was the door of your room open? A. Yes, sir.

Q. You heard the two whistles and then the two whistles in answer?

A. I heard the two whistles and the two whistles in answer.

Q. Were the whistles answered immediately, that is, did they follow each other at once?

A. Yes, sir, within a space of a few seconds.

Q. Have you any idea how long it was after the whistles blew that the captain ordered hard-astarboad?

A. No, sir, I have no idea. I was trying to go to sleep at the time and I didn't take any notice.

Q. You heard the captain order "hard-astarboard" first? A. Starboard and then hard-astarboard.

Q. Have you any idea how far apart those two orders were? any appreciable time?

A. Yes, sir, there was a good deal of time between them.

Q. Did you notice whether the captain gave the order "hard-astarboard" with an unusually loud voice?

A. It didn't strike me as if it was any unusually loud voice; it is the ordnary way he sings out an order.

Q. How long was that before he gave the order "All hands on deck"?

(Testimony of George Stevenson.)

A. I could not say how long it was.

Q. What were you doing all this time?

A. As soon as I heard "hard-astarboard" I jumped out of my bunk, and I thought there was something wrong.

Q. Why did you think there was something wrong?

A. Because I heard the two whistles and then the distinct orders given, and I thought I would go and see what was the matter.

Q. Don't you remember that the captain's order "hard-astarboard" was given in rather a loud tone of voice, and didn't that disturb you?

A. No, sir; it was just as he usually gave his orders.

Q. As soon as you heard it you jumped out?

A. Yes, sir, I heard the distinct order.

Q. And you jumped out of your bunk immediately?

A. Yes, sir.

Q. What did you do?

A. I started to look for my boots.

Q. You began dressing, you mean?

A. I just pulled my boots on. I had my coat and waistcoat off, and I was very nearly dressed.

Q. How far did you succeed in getting your coat and waistcoat and boots on at the time?

A. I had my underclothes on and I picked up my coat and vest, and then I wasted some seconds in looking around—I could not get hold of any light and I had no matches around.

Q. And then you heard the order "All hands on deck"?

A. Yes, sir.

(Testimony of George Stevenson.)

Q. And you went up immediately?

A. Yes, sir, I went straight up.

Q. Without looking any further for the light?

A. No, sir, I got the light first. I wanted to look for my clothes.

Q. You looked for the light after you got the order "All hands on deck"?

A. No, sir, not after they asked all hands on deck. I went up immediately.

Q. You went up immediately when you got that order?

A. Yes, sir.

Q. When you got up there how long after that was it the collision occurred? Did you hear the shock before you got up?

A. I heard the shock before I got out of the hallway.

Q. It must have been immediately after he called "All hands on deck" then? A. Yes, sir.

Q. And when you got up on deck you say the vessel was clear of your ship? A. Yes, sir.

Q. She had passed your bow?

A. She had passed our bow and she was just about amidships.

Q. About how far away was she from the side of the ship?

A. I did not notice. I saw her then and I jumped back—I thought some of her spars were coming down.

Q. That was early in the morning? A. Yes, sir.

Q. Did you notice particularly what time it was?

A. No, sir, I didnt take the time at all.

(Testimony of George Stevenson.)

Q. Did you notice particularly which way the tide was running or whether it was slack?

A. No, sir; I did not notice the tide at all.

Q. Did you see either of the "Lakme's" lights?

A. Well, I could not swear that they were the "Lakme's" lights but when the tug went out there was a bank of lights like the light around the deck here, but I could not say that they were her lights.

Q. You don't remember whether you saw either her starboard or port lights? A. No, sir.

Q. How far away was the tug when you got on deck, the "Tyee," where was she at the time?

A. She was a little on the bow.

Q. Just make a note on your diagram marked "F."

A. Somewhere about here, a little on the bow; I don't know which way she was heading.

(Here the witness marks the point where the "Tyee" was with the letter "T.")

Q. Have you any idea how far she was away from you?

A. She was within two hundred yards of us..

Q. Was the "Lakme" moving fast at the time you got up on deck, was she moving fast?

A. I could not state—we were passing each other and I could not tell whether she was moving or not; she might have been stuck, for all I know—we had a way on us, though.

Q. Did you hear the captain make any remark of this kind: "What are they trying to do"? A. No.

Q. You did not hear him say that at all?

(Testimony of George Stevenson.)

A. No.

Q. The only thing you heard him say was the orders?

A. Just the orders.

Q. Did you hear anything said at all by the people on the "Lakme" or the tug?

A. I heard the captain of the tug say "hard-aport" after we had collided.

Q. You say the reason that the captain was in charge of the tug at that time was because you had been unloading ballast at Port Townsend? A. Yes, sir.

Q. How long had you been occupied in unloading ballast? A. How many days?

Q. How many hours prior to the time?

A. We had been working from seven o'clock in the morning until about eight o'clock at night. It was half past seven when we knocked off—I remember taking the time, half past seven at night.

Q. Were all of the crew engaged in that work?

A. No, sir, the boatswain was not.

Q. All but the boatswain?

A. All but the boatswain—no, I think Johnson was laid up with a sore finger, if I am not mistaken, there was one man laid up with a sore finger.

Q. Would the carpenter be engaged in that work also?

A. Oh, yes.

Q. And you knocked off that work about 7:30?

A. We quit about 7:30.

Q. Was there any more work done after that?

A. No, sir.

(Testimony of George Stevenson.)

Q. Then the next thing that was done was when you hove the anchor? A. Hove the anchor up.

Q. When was it you hove the anchor?

A. Somewhere around midnight. I could not exactly say; I did not notice the time when we got up.

Q. Were all the crew engaged in that work in heaving the anchor and getting ready to sail?

A. Well, they were all called out except the man with the bad hand and he was not called out until after the anchor was up.

Q. And that was the reason why the captain went on deck instead of the mate? A. Yes, sir.

Q. Because you were tired from that work?

A. Yes, sir.

(Testimony of witness closed.)

United States of America,
District of Washington, } ss.
Northern Division.

I, A. C. Bowman, United States Commissioner for the District of Washington, do hereby certify that the annexed and foregoing transcript of testimony and proceedngs, from page 1 to page 89, inclusive, was taken before me at the times and in the manner therein specified.

Each of the witnesses therein named, before examina-

tion, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth.

The signature of each of said witnesses to his testimony was duly waived by the parties, the testimony of said several witnesses to be received with the same force and effect as if signed by said witnesses.

The exhibits offered by the libelant, and filed and marked by me Libelant's Exhibits "A," "B," "C," "D," "E," "F," and the exhibits offered by the claimant, and filed and marked by me as Claimant's Exhibits are returned herewith.

I further certify that I am not proctor nor of counsel for either party to said suit, nor interested in the result thereof.

In witness whereof I have hereunto set my hand and affixed my official seal, this 23d day of May, 1900.

[Seal U. S. Com'r.] A. C. BOWMAN,
United States Commissioner.

In the District Court of the United States, for the District of Washington, Northern Division.

QUEEN ELIZABETH COMPANY, LIMITED (a British Corporation),
Libelant,
vs.
The American Steamer "LAKME," Her Boilers, Engines, Tackle, Apparel and Furniture,
Respondent.
CHARLES NELSON,
Claimant.
No. 1708.

Stipulation as to Taking Depositions.

Present: L. C. GILMAN, Esq., of Proctors for Libelant.
W. A. PETERS, Esq., of Proctors for Claimant.

It is hereby stipulated by and between L. C. Gilman, proctor for the libelant, and W. A. Peters, proctor for the claimant herein, that the depositions of H. F. Flint and Mrs. Susan P. Fulton de bene esse on behalf of the libelant may be taken before A. C. Bowman, United States Commissioner in and for the District of Washington, on Saturday, the 26th day of May, 1900, at the hour of 1:30 o'clock P. M., and that said depositions may be used upon the trial of the above-entitled cause with the same effect

as though the same had been taken after a reference of said cause.

This stipulation is entered into in the presence of said Commissioner, and is to have the same force and effect as a stipulation made in open court.

Deposition of Susan P. Fulton.

Deposition of SUSAN P. FULTON, a witness produced pursuant to the foregoing stipulation, who after being duly cautioned and sworn, testified as follows:

Q. (Mr. GILMAN.) Mrs. Fulton, you are the wife of Captain Fulton? A. Yes, sir.

Q. Of the "Queen Elizabeth?" A. Yes, sir.

Q. Do you go to sea with your husband?

A. Always.

Q. How long have you been going to sea?

A. Twenty years.

Q. Were you on the "Queen Elizabeth" on the 14th day of April last, that was the day of the collision?

A. Yes, sir, on the day of the collision; I do not remember just what date it was, but I was there.

Q. Where were you at the time the tug took hold of the vessel at Port Townsend, that is, what portion of the ship? A. In the cabin on the port side.

Q. Where was Captain Fulton at that time?

A. He was on deck.

Q. At what time did Captain Fulton go on deck from the cabin that night?

A. Well, the hour I do not know, but when the tugboat came alongside the night watchman called him and

(Deposition of Susan P. Fulton.)

said the tugboat was alongside and he got up and went on deck.

Q. Now, I will ask you whether or not he returned—I will ask you where he was from that time, from the time he went on deck when the watchman called him until the collision? A. On deck.

Q. Did he return to the cabin at any time?

A. No, sir, not once.

Q. Were you on deck at the time of the collision?

A. Yes, sir.

Q. What first attracted your attention?

A. The first I heard two blasts of the whistle and I knew that something was getting near us, so I was lying there awake and that probably wakened me, and I heard my husband say to the man at the wheel, "Starboard," then he said "Starboard"; then I waited as my usual habit is when anything is getting kind of near us; then in a short time I heard him say "Hard-astarboard," and thought it was time that I was getting out. And I laid there a little while and then I heard him say, "All hands on deck!" then I turned out and ran across the cabin, and on my way up I called to the cabin watch and went upstairs and went on deck, and I was on deck before she struck.

Q. How near was the "Lakme" to the "Queen Elizabeth" at the time that you got on deck, if you noticed?

A. Well, I could not say because she was forward and I was aft, and in the dark I could not tell the distance.

(Deposition of Susan P. Fulton.)

Q. About how long was it after you got on deck before the "Lakme" struck you?

A. It would be no time, I just merely opened the door, and went up properly on deck.

Q. Where did the "Lakme" strike?

A. She struck her forward.

Q. On which side?

A. On the port side. When she passed along I could see her spars and sticks, and the "Lakme" was glancing away from us.

Cross-Examination.

Q. (Mr. PETERS.) About what time did you retire that night, Mrs. Fulton?

A. Well, I could not positively say, but it might have been nine o'clock; it might have been ten. The captain was ashore. It was very late when they finished discharging ballast, so it might have been ten o'clock.

Q. Were you awake at the time the tug came alongside and they left Port Townsend?

A. Oh, yes; when the watchman called the captain it woke me and I heard him getting up and getting under way.

Q. You did not go out of the cabin at that time?

A. No.

Q. Now, you say that probably the two blasts of the whistle wakened you. Did you hear the answering blasts of any other ship?

A. No, I merely heard the two blasts.

(Deposition of Susan P. Fulton.)

Q. Was that such an unusual occurence that it would wake you?

A. Well, I have been to sea twenty years and any unusual sound—I know when ships are around I am on the alert and I do not sleep very sound.

Q. Then, it added to your anxiety, did it not, when the captain gave the order to the man at the wheel to starboard?

A. No, not at all, not until he said, "Hard astarboard"; I knew something was getting in near us.

Q. You heard him give two orders to starboard before he commanded "hard astarboard"?

A. Yes, sir. Just the ordinary—

Q. Neither of these incidents added to your anxiety at all? A. Not at all.

Q. Then how long was it, do you imagine, in point of time after he commanded "hard-astarboard" that he called all hands on deck?

A. I could not say how long it was; the time was not so very long, still it was not instantaneous.

Q. Could you give us any idea?

A. No, I could not. I know that when he said "Hard-astarboard," I knew that there was a ship or something approaching; it did not alarm me enough to turn out.

Q. Did you feel any change in the momentum of the vessel when the rudder was changed? A. No, sir.

Q. You stopped and called the cabin watch?

A. I did not stop, but as I passed through out of the doorway I called all hands on deck just as loud as I could.

(Deposition of Susan P. Fulton.)

Q. Who were in the cabin watch?

A. The mate and the second mate and the steward to the captain.

Q. Is the carpenter in the cabin? A. No, sir.

Q. What is the name of the second mate?

A. Stevenson.

Q. What is the name of the first mate?

A. John Dott.

Q. It was so dark you say that you could not see the "Lakme" when you first came on deck?

A. Well, I had come out of my room where there was a light burning, and when I came on deck it was a clear night, but the clouds were over the moon and it was a considerable distance from our poop deck to the bow and I could not—

Q. You did not see the "Lakme," then, you think until after she struck?

A. No, I do not think that I saw her until after she struck.

Q. Do you recollect the position in which she was after she struck when you saw the spars between you and the "Lakme"? A. Yes, sir.

Q. Could you sketch this?

(Witness draws diagram.)

A. Now, the "Lakme" was going off in that direction—not so much at that—more in this direction.

Q. She was going off that way? (Showing.)

(Deposition of Susan P. Fulton.)

A. Yes, sir, and I saw her—A is our bow and B is the course of the "Lakme."

Q. (Mr. GILMAN.) The course of the "Lakme" is towards B? A. Yes, sir.

Mr. PETERS.—I desire to offer this diagram in evidence as part of the cross-examination of the witness.

(Paper received without objection and marked Claimant's Exhibit No. 1, filed and returned herewith.)

Q. (Mr. PETERS.) Was she just abeam of you when you saw her or was she still off the port bow?

A. No, I saw her on the bow.

Q. You saw her when she was still about opposite the bow?

A. Yes, along here is where I saw her. (Showing.) That is where I saw the spars.

Q. Did you hear the captain make any remarks, such as "Where are you coming to?" or "What are you trying to do?" about the time of the collision?

A. Yes, I think I did.

Q. Do you recollect just what expression?

A. This expression of his was, I suppose he said it, I would not stake my oath that I heard it, I know that is an expression of his, and very likely he said it.

Q. You only conclude that he did say it because it is a usual expression, you do not recollect it definitely?

A. No, I do not recollect it definitely. You see he was on the forward part of the poop when I went on deck, he went forward and I never spoke to him

(Deposition of Susan P. Fulton.)

and he never spoke to me. Then, when I turned to come aft I saw this shore light a little bit on the port quarter and I said to the man at the wheel, "Is that a shore light?" and I do not know what he answered, because before the man could tell me I knew myself it was a shore light.

Q. That was a light on Point No Point, was it?

A. Yes, sir.

(Deposition of witness closed.)

At this time further proceedings were adjourned until half-past ten o'clock Monday, May 28th.

Deposition of H. F. Flint.

Seattle, May 28, 1900, 10:30 o'clock A. M.

Continuation of the taking of depositions pursuant to adjournment.

Present: L. C. GILMAN, Esq., of Proctors for Libelant, W. A. PETERS, Esq., and H. S. GRIGGS, Proctors for Claimant.

Deposition of H. F. FLINT, a witness produced pursuant to the foregoing stipulation, who being first duly cautioned and sworn, testified as follows:

Q. (Mr. GILMAN.) What is your occupation?

A. Marine engineer.

Q. How long have you been engaged in that occupation? A. For the last eleven years.

Q. Been on what vessels?

(Deposition of H. F. Flint.)

A. For the last seven years or more I have been employed by the Puget Sound Tugboat Association.

Q. And have been engineer on tugboats?

A. Yes, sir.

Q. Have you ever acted as chief engineer on the "Tyee"? A. Yes, sir.

Q. Were you employed on the "Tyee" on the 14th of April last? A. Yes, sir.

Q. In what capacity? A. Assistant engineer.

Q. Who was the chief engineer?

A. Harry Harkins.

Q. Were you on duty at the time of the collision between the "Lakme" and the "Queen Elizabeth"?

A. Yes, sir.

Q. Where was your station?

A. In the engine-room.

Q. Did you see any of the occurences surrounding that collision? A. Yes, sir.

Q. What was the first thing that called your attention to the "Lakme"?

A. Two blasts of the "Tyee's" whistle.

Q. Did you then come on deck?

A. I was already on deck.

Q. When you heard these blasts did you observe the approaching steamer? A. I did, yes, sir.

Q. Where were you standing?

A. In the engine-room.

Q. On which side? A. On the starboard side.

Q. Did you notice the approaching steamer?

(Deposition of H. F. Flint.)

A. I did, yes, sir.

Q. About how did she bear to the tug?

A. She bore—well both her lights were visible from the engine-rooms. She bore just about amidships, about at an angle so that her sidelights were visible to me from the engine-room.

Q. Now, what course was taken by the "Tyee" after giving this signal of two blasts?

A. Judging from the movements of the "Tyee" her wheel was hard-astarboard.

Q. She went to starboard. Did you notice the tow at that time, the "Queen Elizabeth"?

A. Yes, sir—not just at that time but in a small space of time I looked at her.

Q. State what course she took?

A. She was following us, swinging of course some on the outer circle, following the "Tyee."

Q. Did not she fall off as rapidly as the "Tyee"?

A. She would not obey the helm as rapidly as the "Tyee."

Q. Why?

A. Being a larger vessel, much longer and much more exposed out of the water and offering more resistance.

Q. She was in ballast?

A. As far as I understand, yes.

Q. Would she obey the helm as quickly as though she were loaded, or what would be the facts about that?

A. That would be according to the weather. Of

(Deposition of H. F. Flint.)

course, you would have to take into consideration the wind and everything.

Q. You have frequently been engaged in towing large vessels with the "Tyee"? A. Yes, sir.

Q. What is the rule as to that when the tug changes her course, whether the ship will fall off as rapidly as she will change her course?

A. No, sir, they never do.

Q. Now, did you observe the course of the "Lakme" as she approached the "Tyee"?

A. Yes, sir, as we were continuing with a hard-astarboard wheel, she was evidently under a hard-aport wheel and her relative position was just about the same.

Q. From what direction did she approach you?

A. From the starboard side.

Q. Now, as she approached you was she swinging towards you or away from you?

A. Towards us, bearing down on us all the time.

Q. Are you able to say from the course that she took whether her helm was to the starboard or to the port?

A. Her helm was most assuredly hard-aport.

Q. How near did she approach you?

A. Well, she passed our stern; had anyone been so inclined they could have stepped on board of her.

Q. Did you observe her after she passed your stern?

A. Yes, sir.

Q. State what course she took then.

A. She evidently had starboarded her wheel after she passed our stern.

(Deposition of H. F. Flint.)

Q. Then she passed your stern with her wheel to port and then threw her wheel to starboard?

A. Yes, sir.

Q. Did she make a turn towards port after passing you?

A. Between the time when she passed us and before she struck the vessel she did.

Q. What was the result?

A. She collided with the "Queen Elizabeth's" port bow.

Q. About how far was the "Queen Elizabeth" from you?

A. The "Elizabeth" was about 600 feet, we had just about half the hawser out.

Cross-Examination.

Q. (Mr. GRIGGS.) Had you observed the "Lakme" before the "Tyee" whistled? A. No, sir.

Q. How long were you on deck before the whistles were blown?

A. I came on deck at one o'clock that morning.

Q. You remained on deck all the time?

A. I remained on deck there in the engine-room, being on watch, you know, I remained on deck until 7 o'clock that morning when I was relieved by Mr. Harkins.

Q. (Mr. GILMAN.) Are you going to leave this jurisdiction?

(Deposition of H. F. Flint.)

A. Well, possibly within the next ten days.

Q. Where are you going? A. Cape Nome.

Q. (Mr. GRIGGS.) Where was the tug when you went on deck, went on watch?

A. I found her alongside and hooking on the "Queen Elizabeth."

Q. Where had you come from?

A. From the wharf at Port Townsend.

Q. How long had you been lying at the wharf there?

A. I would not be positive, but I think somewheres in the neighborhood of about six hours.

Q. Where had the tug come from when she arrived at Port Townsend first? A. I do not remember.

Q. Were you on all the time? A. Yes, sir.

Q. Had not you been engaged in towing prior to that?

A. Yes, sir.

Q. You do not remember which tow she was engaged on? A. No, sir.

Q. Do you remember what she had been doing on Saturday at all? A. No, I do not.

Q. Had you been on watch at all Saturday before she got into Port Townsend? A. No, sir.

Q. Hadn't she been doing towing in the sound here?

A. I do not recollect whether we were coming from the cape or the quarantine station.

Q. Do you remember about when you got into Port Townsend?

A. It must have been somewheres, as near as I recollect, along about—I would not be positive about that.

(Deposition of H. F. Flint.)

Q. How early in the evening?

A. Possibly about seven o'clock.

Q. How much of a crew did you have on the "Tyee"?

A. Two engineers, four firemen, two coal-passers, and three deckhands, a captain, mate, cook, and a steward.

Q. Were all these men on board of the "Tyee" when she was towing the "Queen"? A. Yes, sir.

Q. They were the same persons that were on board the "Tyee" at the time that she was lying at the wharf at Port Townsend?

A. Well, they were all employed there at that time; whether they were all on board of her when she was lying at the wharf, I could not say.

Q. Were you ashore at any time during the time you were lying at Port Townsend? A. Yes, sir.

Q. Were you ashore with any of the rest of the crew?

A. No, sir, I was not.

Q. How long before the tug left the wharf to take the "Elizabeth" in tow had you returned to the tug?

A. I could not tell you, I might have returned a half a dozen times during the time she lay there.

Q. You say that you were standing in the engine-room on the starboard side when you first noticed the "Lakme"?

A. Yes, sir.

Q. That was immediately after the whistles were blown? A. By the "Tyee," yes.

Q. Now, how long, if at all, prior to the time when you noticed the "Lakme" after the whistles were blown, had

(Deposition of H. F. Flint.)

you been standing in such a position that you could have seen the "Lakme," had you been looking in that direction? A. Sir?

Q. How long had you been standing in such a position that you could have seen the "Lakme" if you had been looking in her direction?

A. Just the moment the two blasts of the whistles I got up and looked out of the door.

Q. That is, you had to get up out of the position where you were on watch in order to see?

A. Well, you see I was sitting in a chair in the engine-room and I heard the two blasts, and I arose and looked out of the door and seen her lights.

Q. But from where you were sitting at first you could not see the "Lakme"?

A. That is the idea. Unless I got up and looked out of the door.

Q. Now, do you know which of the crew were on deck where they could have seen the "Lakme" at all times?

A. The mate and the one deckhand or the quartermaster were supposed to be in the pilot-house on watch.

Q. How long did you stand up there and observe the "Lakme" after you got out of your seat as described when the whistles were blown?

A. Oh, a very short space of time.

Q. You just got up to see where the vessel was and went back again. A. To my seat?

Q. Yes, sir.

A. No, sir, I did not. I just noticed the "Lakme" was

(Deposition of H. F. Flint.)

bearing down on me and I opened Harkins' door and I said to Harkins, "For Christ's sake, get up! We are going to have a collision." That is the remark I made to him.

Q. How far away was the "Lakme" when you made that remark or when you saw her?

A. When I first observed the "Lakme" I should imagine she was in the neighborhood of about 800 feet from the "Tyee."

Q. Do you know who it was that blew the two whistles on board the "Tyee"? A. No, sir, I do not.

Q. Do you know whose duty it was?

A. It was the mate's.

Q. Did you hear the two whistles from the "Lakme" immediately after the two from the tug?

A. No, sir, I did not.

Q. You did not hear them?

A. No, sir, I did not.

Q. You did not hear the "Lakme" blow any whistle at all?

A. I did not; no, sir.

Q. When you got up to observe her did you notice any steam arising from her as if from blasts from whistles that had already been blown?

A. No, sir, I did not.

Q. Now, when you got up to look out you knew that the tug's whistle had been blown and the course of the "Tyee" had been changed to hard-astarboard, you say?

A. Yes, sir.

(Deposition of H. F. Flint.)

Q. Did you notice before that what course the tug was bearing? A. No sir.

Q. Had you paid attention to the lights and points on the land as you passed? A. Yes, sir.

Q. Did you notice Point No Point light?

A. I did.

Q. Do you remember about where the tug was with reference to that light?

A. The tug was probably about in the neighborhood of about two miles this side of the light.

Q. That is, when you first got up and looked out after the two whistles were blown?

A. No, just right after the accident the light was about two miles this side of us.

Q. Did you notice that light at all at the time that you got up on deck immediately after the two whistles were blown? A. No, sir, I did not.

Q. Did you notice it just before?

A. I noticed it when we passed it.

Q. Can you recollect about how long it was before the whistles were blown after you passed the light?

A. About when the "Lakme" struck the "Queen" the clock in the engine-room registered just exactly 3:45, that is the remark that I made to Mr. Harkins that it was 3:45 o'clock.

Q. The clock of the engine-room?

A. Yes, sir. There was a battery of clocks and gauges right there?

(Deposition of H. F. Flint.)

Q. That was exactly when the collision occurred, was it?

A. Yes, sir, I heard the crash and saw the fire flying and I just glanced at the clock in the engine-room and it registered 3:45.

Q. You made that remark to Harkins?

A. Yes, sir, I made that remark to Harkins.

Q. Was that remark made for the purpose of a notation as to the time when it occurred?

A. I thought likely that I would be required to tell about what time it occurred.

Q. Had you made any changes of speed of your vessel after the whistles were blown? A. No, sir.

Q. When did you first slow down or stop?

A. Immediately, right after the hawser parted.

Q. What did you do then, did you stop the vessel?

A. I received signals from the pilot-house and I stopped the engine.

Q. How long was the tug?

A. The "Tyee," if I remember correctly, is 147 feet long.

Q. On what part of the vessel is the engine-room where you were standing, how far from the bow or stern?

A. I think from where I was standing it was about somewheres in the neighborhood of sixty feet from the stern.

Q. Did you notice how many of your crew came on deck or were on deck at the time of the collision?

A. Outside of Mr. Harkins I could not swear as to who

(Deposition of H. F. Flint.)

were on deck, although I heard Captain Bailey yelling to the captain of the "Lakme" that he was too late, I could not swear that it was he talking, but I simply heard his voice and heard him yelling that he was too late.

Q. That was just about as the boats were passing each other?

A. Yes, sir, just before she struck the "Queen Elizabeth." Just after we passed and before she struck the "Queen Elizabeth."

Q. You did not notice anything else that was done by any other members of your crew?

A. Of my crew in the engine-room?

Q. No, on the "Tyee"?

A. No, sir; except of course her swinging under the hard-astarboard wheel there was surely someone directing her movements.

Q. Did you notice shortly prior to the time the tug blew two whistles the course you were bearing with reference to the shore line?

A. Well, we were running about parallel with the shore.

Q. Could you see the shore from the chair that you speak of where you were sitting in the engine-room?

A. No, sir.

Q. You would have to get up as you described?

A. Yes, sir, I probably would walk to the engine-room window and look out, and sit down and get up again.

Q. Every time you would get up and walk over there you would see the shore?

(Deposition of H. F. Flint.)

A. Yes, sir, the half door being open you could see the shore.

Q. Where was Mr. Harkins' room, right along on the starboard side of the tug, was it?

A. On the starboard side of the tug, right ahead of the engine-room.

Q. Where was Captain Bailey's room?

A. Captain Bailey's room was aft of the pilot-house on the starboard side—no, it is right aft of the pilot-house, I think his room leads right cross the upper deck.

Q. On the starboard side?

A. No, I think it is directly aft of the pilot-house; at one time the captain's room was partly on the starboard side, but I think the partition was changed, the guests' room was taken out and his room comes in right after the pilot-house.

Q. Where would that be with reference to Harkins' room, further aft?

A. No, forward, Captain Bailey's room is.

Q. Aft of the pilot-house is it? A. Yes, sir.

Q. How far would that be from Harkins' room?

A. That would be probably in the neighborhood of forty feet, I should imagine.

Q. Could you hear any of the orders that were given on board of the tug?

A. Outside of the bells, no.

Q. I suppose there was no way for you to be able to tell whether one man gave the order or another?

A. Well, yes, I could, because Captain Bailey is much

(Deposition of H. F. Flint.)

more rapid in his signals to the engine-room than the mate would be.

Q. Could you tell in that way or in any way who gave you the orders to stop the engine?

A. I have an idea it was Captain Bailey who rang the bells.

Q. You heard none of the orders to the helmsman?

A. No, sir.

Q. Did Captain Bailey order any person on board your boat to stand by about the time the "Lakme" was passing your stern?

A. No, sir, I heard Captain Bailey deliver no orders whatever.

Q. Were you standing by where you could see the vessels, when the "Lakme" passed the stern of the boat?

A. The "Tyee," yes.

Q. You think they passed close enough so that one person could have stepped on the other?

A. Yes, I think that I could. I think a man could have got on board of the "Lakme."

Q. Can you show on a piece of paper here as near as you recollect, at what angle the two boats, or the keel of the two boats, stood when they passed each other?

A. That is, when the "Lakme" passed her stern?

Q. Yes, when she passed the "Tyee's" stern?

(Witness draws diagram.)

Q. Can you mark also, or did you notice particularly at that time, about how the "Queen" stood?

(Deposition of H. F. Flint.)

A. The "Queen" stood off in about this position here. (Showing on diagram.)

Q. She was swinging on the same course?

A. Yes, sir, she was under a hard-astarboard wheel. She would not describe the circle as rapidly as the "Tyee."

Q. Will you mark on the diagram, showing the "Tyee," about where you stood?

A. Just about there. (Indicating.)

Q. You were on the starboard side? A. Yes, sir.

(Paper offered in evidence by proctor for claimant, received in evidence without objection, marked Claimant's Exhibit No. 2, filed and returned herewith.)

Q. Now, as the "Lakme" passed your stern, did you notice whether she was swinging to the starboard or to the port?

A. No, right after she passed our stern I noticed that she was evidently under a wheel that was just opposite to what she had been.

Q. Just after she passed you she changed her course?

A. Yes, sir.

Q. Do you remember how she changed it, whether to starboard or to port?

A. It must have been a hard-astarboard wheel she swung off instead of hard-aport—well, she swung the reverse way. About the time I noticed it I heard Captain Bailey yell to him that he was too late, too late.

Q. Now, did Harkins get up immediately after you called him?

(Deposition of H. F. Flint.)

A. Yes, sir, he got right out of his room.

Q. Well, when he was by was he in charge of the engine immediately, or did you still remain?

A. I still remained in charge of that watch.

Q. But do you know how far back from the stern of the tug the hawser parted? A. No, sir, I do not.

Q. You thought there was about half of the hawser out, what is the full length of the hawser?

A. I think the length of the hawser was about—including the pennant—of course there is always a wire pennant, 200 fathoms, I think that is the length of the hawser.

Q. 200 fathoms? A. Yes, sir.

Q. So that you think there was only about 300 feet of the hawser out?

A. I stated half of the hawser was out, the length would be 600 feet.

Q. Do you know the dimensions of the hawser?

A. It must have been a twelve inch hawser.

Q. Wire or rope?

A. Manilla hawser.

Q. About how much of the pennant was there of that wire?

A. Fifty fathoms of wire I understand was the length.

Q. Was the wire pennant on the end of the hawser fastened to the tow or on the end fastened to the "Tyee."

A. The wire pennant was made fast to the "Queen Elizabeth."

(Deposition of H. F. Flint.)

Q. Now, after the collision you say the engines were stopped after the hawser parted?

A. After the hawser parted, that is what I said.

Q. The engines were stopped and what did you do then?

A. We swung around and followed the "Lakme" down, went down alongside of the "Lakme."

Q. Swung around which way?

A. Kept right around under the same wheel that we had been already under, the hard-astarboard wheel.

Q. What did you do then?

A. Went up alongside of her and asked if he was badly damaged, Captain Bailey did.

Q. How long was it before the tug picked up the tow again, the "Queen"?

A. I could not state the time that elapsed, but I should imagine it was about a half an hour when we went back to the "Queen" again.

Q. You remained on watch until—

A. Until we were entering Port Blakeley harbor.

Q. Do you know whether Captain Bailey was in his room or whether he was on deck at the time the whistles were blown?

A. Captain Bailey should have been in his room, I do not know whether he was or not, I could not swear.

Q. Is the Harkins you refer to as the chief engineer on the tug, there yet?

A. No, sir, he is in Cape Nome or on his way there; he left on the "Discovery."

(Deposition of H. F. Flint.)

Q. Is he any longer in the employ of the Puget Sound Tugboat Association, or has he gone there permanently?

A. He has resigned.

Q. Was Harkins chief engineer at the time of the collision between the "Ravenscourt" and the "Columbia," the two tows?

A. Yes, sir.

Q. When did that occur?

A. I do not remember the date.

Q. Was that before or after this collision?

A. Before.

Q. Were you on board then? A. Yes, sir.

Q. Do you know how many of the crew that was on the "Tyee"—it was on Saturday the collision occurred, was it not? A. I think so.

Q. Do you know how many of the crew that was on the "Tyee" at that time are still with the tug or with the association?

Mr. GILMAN.—I object as not proper cross-examination.

A. Captain Bailey, for one, and unless he has resigned, one fireman.

Q. One fireman—you only had one fireman?

A. Oh, no. One that I know is there, unless he has resigned within the last few days.

Q. Have all the others left? A. Yes, sir.

Q. What is the name of the mate?

A. The mate on the morning of the collision was Harvey Olsen.

(Deposition of H. F. Flint.)

Q. Has he left? A. Yes, sir.

Q. Do you know the name of the man that was in the pilot-house at the wheel that morning?

A. No, sir—that is, you are speaking of the quartermaster?

Q. Yes. A. No, sir.

Q. Do you know the name of the man that was on the lookout with him?

A. Harry Olson, the mate, was supposed to be.

Q. Do you know whether any of these men have been discharged or whether they have all resigned voluntarily?

A. As far as I know voluntarily.

Q. Do you know what your speed was prior to the collision?

A. We were going in the neighborhood of eight knots an hour.

Q. Did you hear any remarks made by the captain on the "Queen" at the time of the collision?

A. No, sir.

Q. When you left your seat and went up on deck after the two whistles—

A. I did not have to go on deck, on the working platform of the vessel, that is flush with the main deck, and I was already on deck and I did not have to go up.

Q. When you looked out and saw the "Lakme" after these two whistles were blown, you say you saw her sidesights? A. Both of them, yes.

Q. Could you also see her masthead light?

A. I did not notice that.

(Deposition of H. F. Flint.)

Q. You noticed particularly, though, the two sidelights? A. The two sidelights.

Q. Could you see one just as clearly as the other?

A. Yes, sir.

Q. Have you any idea how many feet you had gone on your starboard course at the time you were looking at the "Lakme" and observing her sidelights, both her sidelights? A. No, sir.

Q. Have you any idea how long it was, as a matter of fact, in time after she changed her course before you observed her sidelights—before you looked?

A. No, sir, I have not.

Q. Well, as I understand it, you went up immediately or shortly after the two whistles were blown?

A. Right after the whistles were blown I got up and looked out of the door. I noticed then that we were swinging or started to swing off before he gave the whistles—I could not say whether he did before he gave the whistles or not.

Q. Do you know, or did you notice how the "Lakme" picked up the hawser? A. No, sir.

Q. Do you know Mr. Reed on board of the "Lakme"?

A. I met him the morning following the collision.

Q. The morning following the collision?

A. I think it was the morning following the collision.

Q. Did you talk with him at all concerning the collision?

A. Why, we were speaking about the collision, I do not remember exactly what passed between us.

(Deposition of H. F. Flint.)

Q. Do you remember making the remark to him that the accident occurred because the whistles were not blown soon enough? A. No, sir, I did not.

Q. Did you say anything of that kind to him?

A. Not that I remember of.

Q. Are you satisfied you did not say it, did not make some such remark?

A. I do not have any remembrance of having made such a remark.

Redirect Examination.

Q. (Mr. GILMAN.) It would be no more the duty of the "Tyee" to signal the "Lakme" than it would be for the "Lakme" to signal the "Tyee"?

A. I do not know what the rules of the road are.

Q. Now, you speak of not having heard the answering whistle of the "Lakme," do you mean to say that she did not answer?

A. No, she may have answered and I not heard it.

Q. Do you know what report there was on your own vessel whether she did or not?

A. I heard the mate and the deckhands say that she did not answer the whistles.

Q. Now, when was it that Captain Bailey made the remark that "You are too late," with reference to the time the "Lakme" put her helm about?

A. Oh, it was just before she struck the "Queen Elizabeth."

Q. After her helm had been changed?

(Deposition of H. F. Flint.)

A. Yes, sir.

Q. Now, you say that Captain Bailey should have been in his room, what do you mean by that?

A. Well, it was his watch off. He never takes a watch until midnight, twelve o'clock.

Q. You have left the employ of the tugboat company, have you? A. Yes, sir.

Q. Why did you leave?

A. To go north, to Nome.

Q. Had your leaving any connection with any collision or collisions that occurred?

A. Nothing whatever, sir.

Q. And how was it in the case of the other men, do you know why they left?

A. Voluntarily, as far as I know, the mate Olsen, he was just temporarily there while Mr. Williams, the former mate, was ill, laid up on account of falling down the bunkers and injuring his back.

Q. (Mr. GRIGGS.) How many trips had Mr. Olsen made? A. I could not say as to that?

Q. How long had he been employed?

A. I could not say as to that, he might have been a week or might have been less than a week, but not over a week.

Q. He has gone to Cape Nome also, has he?

A. The last time I saw him I came up here on a Wednesday and I met him Tuesday afternoon in Port Townsend and he was just going on a fishing boat for some cannery.

(Deposition of H. F. Flint:)

Q. Was he on the boat at the time of this other collision between the "Ravenscourt" and the "Columbia"?

A. No, sir.

Q. Do you know how many trips Olsen made with the vessel after this collision?

A. No, I would not be positive as to the time. After the collision I know that we laid two days in Seattle, that is, around in this neighborhood, with short tows.

Q. Was he with the vessel at that time?

A. When we were making these short runs?

Q. Yes.

A. Yes, he was. I think he remained somewhere in the neighborhood of three or four days after the collision.

(Testimony of witness closed.)

At this time further proceedings were adjourned, to be taken up by agreement.

Seattle, June 18, 1901, 2 P. M.

Continuation of proceedings pursuant to agreement.

Present: E. M. CARR, Esq., One of the Proctors for the Libelants.
H. S. GRIGGS, and W. A. PETERS, Proctors for the Claimant.

WILLIAM MORAN, a witness called on behalf of the libelants, being duly sworn, testified as follows:

Q. (Mr. CARR.) Are you connected with Morans Bros. Company? A. Yes, sir.

Q. In what capacity? A. Vice-president.

(Testimony of William Moran.)

Q. Have any part in the management in the business?

A. Yes, sir.

Q. In what position? A. Assistant manager.

Q. Do you know anything about the bill for repairs made by Moran Bros. Company upon the ship, "Queen Elizabeth"? A. Yes, sir.

Q. Do you know when these repairs were made?

A. About a year ago last April I think.

Q. April, 1900? A. Yes, sir.

Q. Do you know what the amount of Moran Bros. bill for these repairs was? A. Yes, sir.

Q. How much was it?

A. Three thousand dollars.

Q. Even?

A. Three thousand and ten dollars and we received three thousand and we threw off the ten dollars when the bill was settled.

Q. Has the bill been settled and paid?

A. Yes, sir.

Q. How much was paid?

A. Three thousand dollars.

Q. By whom and to whom?

A. I believe the captain of the ship paid the bill, I am not sure.

Q. The master or the owners? A. They paid us.

Q. Paid to Moran Bros. Company? A. Yes, sir.

Q. Do you know when that payment was made?

(Testimony of William Moran.)

A. Within a reasonable length of time after the bill was contracted, I do not remember the exact date.

Q. Shortly after the repairs were made?

A. Yes, sir.

Q. I wish you would state under what kind of a contract these repairs were performed?

A. The work was done I believe by the day.

Q. Are you able to state whether or not the sum of three thousand dollars was a reasonable price for the repairs that were made?

A. It was a reasonable price, yes.

Q. Were the repairs made by Moran Brothers Company to the ship of the reasonable value of three thousand dollars? A. Yes, they were.

Q. And the repairs have been made—could the repairs have been made for less than that sum?

A. No, sir, they could not.

(Testimony of witness closed.)

Mr. ALEXANDER BAILLIE, a witness called on behalf of the libelants, being duly sworn, testified as follows:

Q. (Mr. CARR.) You are the Tacoma manager of the firm of Balfour, Guthrie & Company? A. Yes, sir.

Q. Are you acquainted with the ship "Queen Elizabeth"? A. Yes, sir, I know her.

Q. Are you able to state the dimensions of that ship?

A. Well she is seventeen hundred tons net register. Two hundred and fifty-two feet long, forty feet beam,

(Testimony of Alexander Baillie.)

twenty-two feet depth of hold, built at Glasgow, constructed of steel.

Q. Do you know when the steamer was built?

A. In 1889, for a regular sailing ship.

Q. Who is her owner or what company?

A. She is owned by the Queen Elizabeth Company, managed by J. Block & Company, and sails from Glasgow, Scotland.

Q. Do you know how she is rated at Lloyd's?

A. Yes, she is the highest class, 100 A1.

Q. Do you know the value of that ship's time per day is?

A. Yes, sir. It would be from one hundred to a hundred and ten dollars per day.

Q. Do you know what contract or charter rates for the voyage upon which the ship was engaged, at the date of the collision with the steamer "Lakme" was in April, 1900, she being engaged to load lumber at Port Blakely?

A. I could not answer that without knowing what the voyage is.

Q. But the value of her time here, her value as a freighter.

A. A freighter would be a hundred and ten dollars per day.

Q. I refer to the time when she was engaged on this voyage from Shanghai to Port Blakeley and coming into collision with the steamer "Lakme."

A. That would be the value of whatever her voyage was to be per day.

(Testimony of Alexander Baillie.)

Q. She would be of that value per day, she was of that value per day at that time?

A. Yes, sir, she was of that value per day at that time.

(Testimony of witness closed.)

At this time further proceedings were adjourned to be taken up by agreement.

United States of America,
District of Washington, } ss.
Northern Division.

I, A. C. Bowman, United States commissioner for the District of Washington, do hereby certify that the annexed and foregoing transcript of testimony and proceedings, from page 90 to page 123, inclusive, was taken before me at the times and in the manner therein specified.

Each of the witnesses therein named, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth.

The signature of each of said witnesses to his testimony was duly waived by the parties, the testimony of said several witnesses to be received with the same force and effect as if signed by said witnessees.

The exhibits offered by the libelant, and filed and marked by me Libelant's Exhibits and the exhibits offered by the claimant, and filed and marked by me as Claimant's Exhibits are returned herewith.

I further certify that I am not proctor nor of counsel for either party to said suit, nor interested in the result thereof.

In witness whereof I have hereunto set my hand and affixed my official seal, this 26th day of May, 1900.

[Seal U. S. Com'r.] A. C. BOWMAN,
United States Commissioner.

CLAIMANT'S TESTIMONY.

In the United States District Court for the District of Washington, Northern Division.

QUEEN ELIZABETH COMPANY, LIMITED,
Libelant,
vs.
Steam Schooner "LAKME," Her Boilers, etc.,
Respondent,
CHARLES NELSON,
Claimant,
Steam Tug "TYEE,"
Co-respondent.
} No. 1708.

CHARLES NELSON,
Libelant,
vs.
British Ship "QUEEN ELIZABETH," and The Steam Tug "TYEE,"
Respondents.
} No. 1710.

Stipulation.

It is herein now stipulated between all the parties hereto, at the request of the steam schooner "Lakme"

and Charles Nelson as claimant in the one case and libelant in the other, that Norman Ogilvie, an apprentice on the ship "Queen Elizabeth" now lying at Port Townsend, District of Washington, is a necessary witness on behalf of the Steam Schooner "Lakme" and the libelant Charles Nelson, and that said witness is about to depart from this district on an indefinite sea voyage, and that it is impossible to give further notice of taking said deposition; and it is further stipulated that the deposition of said witness may be taken before the Honorable A. C. Bowman, commissioner, at his office in Seattle at the hour of five (5) o'clock P. M. on the 12th day of June, 1900, without further notice or process herein; and all parties consent that said deposition be taken down by stenographic notes and the signature of said witness is waived; and that said deposition my be used in either or both of the above cases as consolidated.

PRESTON, CARR & GILMAN,
Proctors for the Queen Elizabeth Co. Ltd. and for the ship "Queen Elizabeth."

STRUVE, ALLEN, HUGHES & McMICKEN,
Proctors for the Tug "Tyee" and Claimant Thereof.

STRUDWICK & PETERS,
Proctors for Charles Nelson and the Steam Schooner "Lakme."

Seattle, Wash., 5 o'clock P. M.
Tuesday, June 12, 1900.

Continuation of proceedings pursuant to agreement.

NORMAN OGILVIE, a witness called on behalf of the claimant, called and sworn, testified:

Q. (Mr. PETERS.) Your name is Norman Ogilvie?

A. Yes, sir.

Q. How old are you Norman?

A. Twenty-one years.

Q. And what nationality are you?

A. English.

Q. You are now an apprentice, are you not, on the ship "Queen Elizabeth"? A. Yes.

Q. That is the ship of which Mr. Charles Fulton is captain, is it not? A. Yes.

Q. She is now at Port Townsend? A. Yes.

Q. You are about to sail on her for distant ports, are you not? A. Yes.

Q. Within a few days? A. Yes.

Q. Now, how long have you been, Norman, on the ship "Queen Elizabeth"?

A. Just a little over two years.

Q. You have been with her continuously during that time? A. Yes.

Q. As an apprentice during all that time?

A. Yes.

Q. You were on the "Queen Elizabeth" on the night of April 13th and April 14th, were you not?

A. Yes, sir.

Q. At the time of the collision with the schooner "Lakme"? A. Yes.

Q. Where were you at the time and just before that collision occurred? A. In my bunk asleep.

(Testimony of Norman Ogilvie.)

Q. Were you in your bunk asleep? A. Yes.

Q. What was the first that you knew of it?

A. I heard the captain shouting, "All hands on deck."

Q. Then what did you do then?

A. I did not turn out directly, because I was not on deck at that time and then I heard the collision and I jumped up, stopped to put a belt on, and went out on deck.

Q. And when you got out on deck, what did you find?

A. I was just in time to see the schooner gliding off on the port side.

Q. Had you heard any previous commands to that?

A. No, that was the first.

Q. Had you heard the captain give any orders to the man at the helm?

A. No, I heard nothing but that.

Q. You had not heard him give the orders to the man at the helm to starboard the helm?

A. No, I heard nothing but, "All hands on deck."

Q. All that you had time to do then, was to get a belt on, and get up on deck?

A. Where was your bunk in the ship?

A. In the amidship house, just abaft the mainmast.

Q. Do you know who was at the wheel at this time?

A. Of course I don't know who was on deck, but I was told the boatswain was there.

Q. Of your own personal knowledge you don't know?

A. No.

(Testimony of Norman Ogilvie.)

Q. That is what you learned afterwards from somebody? A. Yes.

Q. Was the captain on deck at that time?

A. He must have been, of course, he woke me up shouting.

Q. And that was the first you heard of it?

A. Yes.

Q. You had been asleep ever since you left Port Townsend? A. Yes, every night.

Q. Did you not have a conversation, a few days ago, about a week ago, with a man over here at Port Blakeley and tell him that you were on deck at this time and just before this collision with the "Lakme?"

Mr. GILMAN.—We object to that as incompetent, irrelevant and immaterial and an attempt to impeach counsel's own witness.

Mr. PETERS.—I will state here that my desire is to show that the witness has made statements different from this at a different time. I do not purpose to impeach him.

Mr. GILMAN.—Our objecion is, that that amounts to impeachment and that can't be done with his own witness.

Q. Did you not make a statement to one at Port Blakeley, a short time ago, just two days before the "Queen Elizabeth" sailed from Port Blakeley, to the effect that you were on deck just before and at the time of the collision? A. Certainly not.

(Testimony of Norman Ogilvie.)

Mr. GILMAN.—Add the further objection that the time and person are not identified.

Q. The time I will state to you was about two days before the ship sailed from Port Blakeley to Port Townsend and the person I don't know his name myself, but he was a German and had a conversation with you there. No such statement occurred on your part?

A. No such statement.

Q. Now, you have been on the ship, you say, for the past two years? A. Yes.

Q. Were you on her in April, 1898? A. Yes.

Q. Now, Norman, this ship, the "Queen Elizabeth," has had practically the same officers for the past ten or twelve months, has she not, that is, Captain Fulton, the same mate, the same boatswain, the same carpenter, for the past ten or twelve months? A. Yes, practically.

Q. The same men that were on her the night of the collision with the "Lakme"? A. Yes.

Q. Now, she had had three other collisions within the past ten or twelve months, has she not?

Mr. GILMAN.—That is objected to as incompetent, irrelevant and immaterial and not in issue in this case.

A. Two others to my knowledge.

Q. With what ships were those and where did they occur?

A. One occurred with a junk, the first one was just before we got into the New York harbor, but the name of the schooner I have forgotten.

Q. The "Birdsall"?

(Testimony of Norman Ogilvie.)

A. I have forgotten. The other was last voyage in Shanghai river with a junk.

Q. Now, was there not a third ont within that period of ten or twelve months?

Mr. GILMAN.—We make the same objection to all this line of testimony.

Q. Do you recollect?

A. Not that I am aware of.

Q. You don't recollect that there was a third one then? A. No.

Cross-Examination.

Q. (Mr. GILMAN.) What duties were you performing about the time of this collision on board?

A. I was cooking.

Q. What time did you go to bed that night, did you turn in?

A. Well, I usually turned in about half past eight or nine o'clock—no certain time.

Q. Well, did you turn in about that time that night?

A. Yes.

Q. So you were not on deck when the tug took the ship from Port Townsend? A. No, I was not.

Q. And after you turned in at half-past eight or nine o'clock, you were not up until the captain shouted, "All hands on deck"?

A. That was the first time I was up.

Q. (Mr. PETERS.) Who is the regular cook of the ship?

A. Well, his name is Volk, as far as I understand the pronunciation of it.

(Witness excused.)

Adjourned.

United States of America,
District of Washington, } ss.
Northern Division.

I, A. C. Bowman, United States Commissioner for the District of Washington, do hereby certify that the annexed and foregoing transcript of testimony and proceedings, from page 125 to page 130, inclusive, was taken before me at the times and in the manner therein specified.

Each of the witnesses therein named, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth.

The signature of each of said witnesses to his testimony was duly waived by the parties, the testimony of said several witnesses to be received with the same force and effect as if signed by said witnesses.

The exhibits offered by the libelant, and filed and marked by me Libelant's Exhibits , and the exhibits offered by the claimant, and filed and marked by me as Claimant's Exhibits , are returned herewith.

I further certify that I am not proctor nor of counsel

(Deposition of L. J. Schage.)

for either party to said suit, nor interested in the result thereof.

In witness whereof I have hereunto set my hand and affixed my official seal, this 12th day of June, 1900.

[Seal U. S. Com'r.] A. C. BOWMAN,
United States Commissioner.

Seattle, July 11, 1900,
4 o'clock P. M.

Continuation of proceedings pursuant to adjournment.

Present: HERBERT S. GRIGGS and W. A. PETERS,
Proctors for Claimant.
HAROLD PRESTON, Esq.,
Of proctors for the Libelant.

Deposition of L. J. SCHAGE, a witness produced on behalf of claimant, by agreement, after being duly sworn, testified as follows:

Q. (Mr. GRIGGS.) State your name?

A. L. J. Schage.

Q. What is your present occupation?

A. Master mariner.

Q. Have you any position with reference to the steamer "Lakme"? A. Yes, sir, I am master of her.

Q. Where is your vessel now?

A. She is lying down at the Columbia dock.

Q. Are you preparing to go to sea? A. Yes, sir.

Q. When do you expect to be ready to leave?

A. I expect to leave here by tomorrow at ten o'clock.

Q. What is your residence?

(Deposition of L. J. Schage.)

A. 128 Battery street, San Francisco.

Q. How long have you been captain of the "Lakme"?

A. About eight months, a little less than that.

Q. Were you captain of the "Lakme" at the time of her collision with the "Queen Elizabeth"?

A. I was.

Q. From what port did the "Lakme" leave?

A. From Tacoma.

Q. When did she leave that port?

A. I have a log here that I kept myself, this is not the ship's official log. I left April 13th, at 9:50 P. M.

Q. For what port were you destined?

A. Bound for San Francisco.

Q. What cargo, if any, did you have on board?

A. Lumber.

Q. Did you have a full cargo? A. Yes, sir.

Q. After you left Tacoma you may state the course of the vessel, and who was in charge up to the time of the collision?

A. I was on deck all the time until we got to Apple-tree Cove.

Q. Was there anybody else on the deck of the vessel up to that time? A. The watch was all on deck.

Q. Who constituted the watch?

A. Well, two seamen, the man at the wheel and the second officer was on watch at the time of the collision.

Q. I mean up to the time of the collision?

A. Well, the second mate had charge of the vessel at the time.

(Deposition of L. J. Schage.)

Q. What did you do when you got to Appletree Cove? Go on and state all about it.

A. Well, I had been up all night then it was about three o'clock in the morning and I felt a little tired, and I thought I would go down below a little while, and I told the second mate to call me when we were down abreast of the light at Point No Point. He came down and called me and said that we were getting down towards the light. I looked out through my window in my room and saw the light. I says, "That is all right, I will be on deck in a second." I was putting on my coat and hat—I had my other clothes all on, just lying on my lounge in my room, when I heard two whistles, and then I immediately went on deck. I went out on deck; my room opened up to the starboard side, and I looked from the starboard side naturally, thinking that I would see the vessel. I did not see any vessel, and I jumped on deck, on the bridge, and the tug "Tyee" crossed my bow, angling, about thirty or forty feet from my vessel. I then had the ship on my starboard side and the tug on my port side. Well, I thought to myself, "Here is going to be a collision." I did not see any way of getting clear of that ship, I was right onto his hawser, and I kept going with my wheel hard-astarboard until we got pretty close up to the ship, when I saw that I was going to strike that ship in the bow, I changed my wheel hard to port, and stopped my engines for fear of getting afoul of the hawser, and of course, we struck the ship.

(Deposition of L. J. Schage.)

Mr. PRESTON.—I move to strike out of the answer of this witness those parts of his statements which are impressions as to what he thought as distinct from what he saw and did.

Q. You say when you were below you heard two whistles? A. Yes, sir.

Q. Was there anything in the nature of these whistles from which you could recognize they were the whistles of your own boat or some other boat? A. Oh, yes.

Q. Were they, as a matter of fact, your own whistles or some other boat?

A. I could hear the whistle of my own boat, and heard two whistles of the other boat.

Q. Which whistle blew first?

A. The tug whistled.

Q. How far apart were the blowing of the whistles on the "Lakme" after the whistles on the tug were blown?

A. I could not tell—how far apart the whistles were

Q. In time?

A. They were answered immediately.

Q. When you went on deck who else was on watch or on deck at the time you arrived on deck?

A. The watch was there, the second mate on the bridge and the man at the wheel, and there was also one of the firemen walking up and down the deck at the time.

Q. Did you have any conversation with or say anything to the wheel man or give any orders to him at the time you went up on deck after the blowing of the whistles, if so, what was it?

(Deposition of L. J. Schage.)

A. As soon as I got on the bridge I asked how was the wheel, hard-astarboard he said, and I said to leave it there.

Q. Could you tell or did you notice after you first arrived on deck whether the vessel was swinging under a starboard or port helm?

A. She was swinging, but very slowly.

Q. I mean the "Lakme"? A. Yes, sir.

Q. Which way was she swinging?

A. She was swinging to port, with a starboard helm.

Q. What was the next order that you gave after you ascertained from the wheelman that his wheel was hard-astarboard?

A. I did not give any orders until I found that we were going to get into a collision. I passed the remark, I says, "Great God!" says I, "We are going to have a collision." That is the remark that I passed.

Q. Did you see the lights of the ship when you first went up on the bridge?

A. I saw the lights of the ship.

Q. What lights did you notice?

A. I noticed the red lights.

Q. How far to your port was the ship when you reached the bridge and first saw her?

A. How far was I from the ship?

Q. How far *the* the ship to your port when you first reached the bridge and first saw her?

A. Well, within a few feet I could not tell, but the

(Deposition of L. J. Schage.)

captain of the tug that he was towing with said he had 120 fathoms of hawser.

Mr. PRESTON.—I move to strike the statement of the captain of the tug.

A. (Continuing.) So we must have been 120 fathoms from the ship, because when I got on the bridge the tug crossed my bow within thirty or forty feet.

Q. How far away should you judge you were from the ship? A. Well, about 120 fathoms, I should say.

Q. Looking towards the ship could you see between the masts of the ship?

A. Yes, sir, every one.

Q. About how fast was your vessel going at the time?

A. We were going about seven miles and a half an hour.

Q. Did she remain under that speed all the time?

A. No, not after I passed the tug, I stopped the engines.

Q. When did you next give an order to proceed, if at all? A. Not until we were clear of the ship.

Q. Did you notice which way the ship "Queen Elizabeth" was swinging when you first got on the bridge?

A. No, I could not tell that. I could not tell which way she was swinging.

Q. Where did the "Lakme" strike the "Queen Elizabeth? A. About the cathead, I should judge.

Q. On her port or starboard?

A. On her port bow.

(Deposition of L. J. Schage.)

Q. How long have you been at sea, either as an able seaman or as an officer?

A. I have been to sea forty-two years.

Q. How much of that time have you held an official position, either as mate, second or captain of a vessel?

A. About twenty years. Twenty years as master.

Q. Where have you operated as master?

A. On the coast of California.

Q. And to what extent?

A. And also in deep water to Australia, and the South Sea Islands, the Hawaiian Islands, and up north to Alaska.

Q. To what extent have you acted as master and officer of steam vessels?

A. Not until I got in the "Lakme."

Q. Do you remember how far you had succeeded in dressing to go on deck at the time you heard the two whistles? A. I was dressed.

Q. You were dressed? A. Yes, sir.

Q. How soon after the blowing of the whistles was it before you reached the deck?

A. Well, I should judge one or two minutes.

Q. Did you do anything after the blowing of the whistles except to go up on deck?

A. No, sir, simply put my hat on, that is all.

Q. Then you went up immediately? A. I did.

Q. As soon as you arrived there you looked for the vessel that had blown the whistles on your starboard?

A. Yes, sir.

(Deposition of L. J. Schage.)

Q. On which side of your ship were you standing when you first got out on deck?

A. On the starboard side. My room door opens right on the starboard side.

Q. And where is the bridge from that point where you were standing, how far?

A. Right over my room.

Q. That was where you went as soon as you failed to see the vessel, you went on top of the bridge?

A. Yes, sir.

Q. Now, from the time you reached the deck, was there anything that you might have done other than you did do in order to avoid a collision? A. No.

Q. You say that after you had passed the stern of the tug you changed the course of the vessel to hard-aport?

A. After I was near the ship. I did not change my course until I saw that it was unavoidable, that I could not help but run afoul of the ship, I must hit her.

Q. If you had not changed the course to hard-aport, in what condition would you have hit the ship?

A. I would have hit her right square in the bow.

Q. And what effect of changing your course to hard-aport was what?

A. Giving her a glancing blow.

Q. Well when you first saw that a collision was imminent, that is, when you got up on the deck, why did not you back your ship?

A. Because I was afraid of the hawser getting in my

(Deposition of L. J. Schage.)

wheel. If I had *found* the hawser the ship would have sunk me.

Q. Which ship?

A. The ship that I had the collision with.

Q. The "Queen Elizabeth"?

A. Yes, sir, I would have been altogether helpless, I dare not work my wheel, I had to stop my engine altogether.

Q. Well, what would have been the effect on the course of your ship if you had backed your vessel or if you had attempted to back your vessel at the time that you passed the stern of the tug?

A. It would have thrown me broadside on the ship's bow and I would have backed my stern and gone to port and would have thrown her broadside to the ship's bow.

Q. What was the immediate effect of the collision upon your boat, what damage was done?

A. Well, the topgallant forecastle was stove in and nineteen stanchions broke, the forward waterways split up more or less, but there was no damage below the deck to amount to anything, simply a little damage and that did not amount to much.

Q. Where did you proceed after the collision?

A. I went a little distance thinking that I could patch up my bow and I calculated to go to Port Townsend and do what repairs I could when I found she was damaged below deck. When I went forward afterwards and investigated I saw it was impossible and then I returned

(Deposition of L. J. Schage.)

here to Seattle and from Seattle I returned to Tacoma and discharged part of my deckload.

Q. Do you know how much of your deckload you discharged?

A. I discharged about two thousand, I think between hundred and fifty and two hundred thousand.

Q. Did you lose any portion of your cargo in the collision?

A. I lost one spar, a hundred and six feet long.

Q. Were any repairs made while you were at either Seattle or Tacoma?

A. Not in Seattle, repairs were made in Tacoma.

Q. Who made these repairs?

A. A carpenter that was building a lighthouse up there, Christensen done the repairing.

Q. And you then having discharged part of your cargo you started out again on the original voyage?

A. I did.

Q. Where did you go?

A. I went to San Francisco.

Q. And discharged your cargo there?

A. Yes, sir.

Q. Were any repairs made while you were at San Francisco? A. Yes, very extensive repairs.

Q. How long did you lay in San Francisco while the ship was undergoing repairs?

A. I was there nearly two weeks. I commenced repairing as soon as I got in, to the dock, we were working

(Deposition of L. J. Schage.)

away and they were discharging and they were two weeks repairing altogether.

Q. Was there any special damage or breaking done to the deck or any portion of the house on it?

A. Yes, the pilot-house was knocked on one side, that is, partly damaged, one end of it broke in and the both davits were twisted up and out of shape and the fore-rigging was carried away and one of my boats was broke.

Q. Did you notice whether any portion of the hawser by which the "Queen Elizabeth" was being towed had become attached in the collision to your vessel?

A. Yes, sir, we had a piece of it hanging on our bow.

Q. How long a portion of the hawser was so attached?

A. Well, the pieces of the hawser might probably have been about seventy or a hundred feet, something between that. It was at the foot of my main rigging probably it would be about seventy or a hundred feet.

Q. Was there any portion of the wire cable attached to a portion that was attached to your vessel?

A. Yes, sir.

Q. How much of it?

A. I could not tell how much of the wire cable there was there, it was in the water.

Q. How was that fastened to your vessel?

A. The wire cut into my fore foot underneath the pipes and made a groove in there so that it kept the wire hanging right on my fore foot.

Q. It was cut in so deep that it held the wire there?

(Deposition of L. J. Schage.)

A. It held the wire there, it could not get out without being pulled out.

Q. How far above the water was your vessel riding at the time of the collision was this point where the wire cable had cut into you? A. About fourteen feet.

Q. Above the water?

A. About fourteen feet from the bottom of the vessel. It was right on the water line, three or four inches above the water line when I got to Seattle.

Q. How far below the bobstay?

A. It was right under the bobstay, right close to it.

Q. Do you know how the house that was broken was damaged?

A. It was damaged by the spar that I had on deck.

Q. You had a spar on deck?

A. Yes, sir it was caught, it must have been caught in the ship's fore foot, or something of that kind and it twisted it right around.

Q. That broke the house?

A. That broke the pilot-house.

Q. At the time of the collision when you change your course to hard-astarboard in order as you stated, to strike a glancing blow—

A. Hard-aport.

Q. Hard-aport, I mean, did you give any directions or any orders to the engineer?

A. I had already stopped the engines, as soon as I put my helm hard-aport.

(Deposition of L. J. Schage.)

Q. Did you give him any different directions at that time? A. No.

Q. You did not start your engines again until after you had struck the ship?

A. No, I did not start my engines for probably fifteen minutes after the collision occurred. I lay there and investigated the damages.

Q. Did you do anything with reference to the collision, when you arrived here in Seattle?

A. I entered a protest.

Q. With whom?

A. I left a copy in the customs-house and gave my report to Captain Bryant and the remaining copy is in San Francisco, I have not got it. I had that up here thinking that you were going to have an investigation with Captain Bryant, and I asked Captain Bryant if he was going to have an investigation and he said he would see about it, so at the time when I was here last, I returned them to San Francisco to our office.

Mr. PRESTON.—I move to strike the conversation with Captain Bryant as incompetent, irrelevant and immaterial.

Q. When you left the port of Tacoma the first time, that was before the collision happened, what lights did you have burning on the "Lakme"?

A. When the collision occurred?

Q. No, before when you left the port of Tacoma?

A. I had my two sidelights and my headlights.

(Deposition of L. J. Schage.)

Q. They were burning and in good condition at the time of the collision, A. Yes, sir.

Q. Were they in proper place at the time of the collision? A. They were.

Q. In what condition was your vessel, the "Lakme"?

A. In good condition in every respect.

Q. Her engines in good condition? A. Yes, sir.

Q. Do you know whether you were nearer the "Queen Elizabeth" or nearer the tug when you stopped your engines? If so, state. A. I was nearer the ship.

Q. How much nearer the ship, do you remember?

A. Well, I do not think it could have been a great deal—I must have been about one third of the distance from the ship.

Q. Was it before or after you had cut the hawser, if you know that you stopped your engines?

A. Oh, I could not swear to the hawser, of course it must have been right on my bow when I passed the tug. I was on the bridge at the time and I did not see the hawser, but the tug getting across my bow and the ship on my starboard side, or port side, certainly the hawser must have been right under my bow all the time, and that was the condition that I was in, I could not see the hawser from the bridge, because I was right under the tug's stern, about thirty or forty feet from her and that's all.

Q. What was the name of your second officer?

A. His name is Guilfoil.

Q. What is the name of your wheelman?

(Deposition of L. J. Schage.)

A. His name is Hanson.

Q. And your watchman or lookout?

A. Hanson also.

Q. And your fireman?

A. I cannot remember his name now.

Q. Was his name Reed?

A. No, that is the first assistant.

Q. Reed was the name of your first assistant?

A. Yes, sir.

Q. First assistant engineer? A. Yes, sir.

Q. You say Guilfoil was your mate?

A. He was second mate.

Q. Do you know how long he had been at sea?

A. He had been at sea from the time that he was fourteen or fifteen years old he told me.

Mr. PRESTON.—I move to strike the answer as hearsay.

Q. Do you know?

A. No, I do not know how long he has been to sea.

Q. How long had he been on the "Lakme" with you?

A. Only from Seattle with me.

Q. Who employed Guilfoil? A. I did.

Q. And did you examine him with reference to his competency at the time you employed him?

A. I did not. I asked him some questions and he gave me satisfactory answers and there was also a man here by the name of ————, he was a shipping officer for steamers and coasters and he told me that he was a first-

(Deposition of L. J. Schage.)

class man, I did not know the man before but he had good references.

Q. You examined into his references and made some examination of him by personal conversation before you employed him, did you? A. Yes, sir.

Q. And the examination was satisfactory to you?

A. It was.

Q. Did you notice what lights were on the tug at the time of passing it?

A. Oh, yes, you could see the tug's masthead lights and see the red light that is, the second mate he was on the bridge—

Q. I asked what you saw when you got on the bridge?

A. I saw his starboard light, the green light and there was his port light, that is all the light that I saw on the tug.

Q. At the time you saw her, how near were you towards being abreast of the tug or opposite her?

A. She was crossing my bow when I saw her.

Q. Practically dead ahead then across your bow?

A. Yes, he was not dead ahead, but he was going this way and I was coming this way, (illustrating) and he was crossing my bow in that manner. Of course here is the "Lakme" coming down here and she came at an angle in this shape.

Q. I wish you would take a piece of paper and designate the position of the three vessels at the time when you first saw them when you first got on the bridge?

(Deposition of L. J. Schage.)

A. Here is the ship, marked Q and here is the tug in this manner marked with a T, and here is the "Lakme" coming this way, marked with an L. Now, they were going this way Here is the tug coming across my bow and here is the "Queen" coming up this way. The course down there is about northwest, quarter west. (Here witness draws compass on diagram.) We were steering northwest, quarter west at the time, going in this direction, (showing); here is Point No Point down below here and Appletree Cove in here. When I went below, I was down here and that was about seven miles from Point No Point when I went below and told them to call me when they got to that light. These are the positions the ships were in after I came on deck. She was going in going—in fact the "Lakme" was closer—she was right close up only thirty or forty feet from the tug when she crossed my bow in that manner, in an angling position. The "Queen Elizabeth" to my knowledge was further over on this side than what I have got it marked on here. (Witness redraws diagram to make corrections.) I am only showing the positions they were in. The vessels were only about a half a mile on this side of Point No Point. They were about a half a mile, probably not that much up the sound from Point No Point. Appletree Cove would be away up here. (Witness marks Appletree Cove with the letter A and marked Point No Point with the letter P).

Q. About what time was it that the collision occurred captain?

(Deposition of L. J. Schage.)

A. About ten minutes to four o'clock.

Q. Did you notice how far out in the sound from the west shore, how far you were from the Point No Point light shore?

A. Well, we were a little more than—a little further to the west shore than we were to the east shore.

Q. You mean you were nearer the east shore than you were to the east shore?

A. We were nearer the west shore than the east shore. The sound is about five miles and a half or six miles across, something like that and of course we were about two miles probably from the west shore, either a mile and a half or two miles from the west shore.

Q. Were there any shoals or obstructions of any kind that you know of between you and Point No Point shore at that time? A. None.

Q. Was there anything there at that time that you saw or know of that would prevent a vessel from going on that side of you, the shallow side? A. Nothing.

Q. Have you with you the ship's log?

A. Well, the log is here, my log.

Q. The log that you keep?

A. The different positions I keep myself.

Q. Did you make any record on your log of the fact in regard to the collision? A. I did.

Q. When did you make it?

A. At the time that the collision occurred, just shortly afterward at 3:50.

(Deposition of L. J. Schage.)

Q. Calling your attention to the record under date of April 14th, I will ask you in whose handwriting that record is? A. Mine.

Q. Is that your signature at the bottom?

A. Yes, sir.

Q. Whose signature is that to the left of yours?

A. The second mate who had charge of the tug at the time.

Mr. GRIGGS.—We offer this entry as part of the captains testimony and I will read it in the record. (Reading:) "April 14th, 1:40 A. M. Westpoint S. B. (starboard beam:) 3:50 collided with ship 'Queen Elizabeth' in tow tug 'Tyee,' second mate having charge of deck. He claiming that ship and tug was approaching on port side. That he could see tug's masthead lights and her red light. He ported his helm so as to pass on the port side of said tug when said tug sounded two whistles. He immediately answered with two whistles and shifted helm to hard-astarboard upon the sounding of the whistles. I immediately went on deck when tug 'Tyee' crossed angling 'Lakme's' bow. I then had the ship still on my port side and the tug on my starboard. There being no chance for me to clear the ship, when I stopped the engines and ported my helm to ease the blow. (Signed) Second Mate, S. Guilfoil. L. J. Showers, Master."

(Diagram drawn by witness offered in evidence and marked Claimant's Exhibit No. 3, filed and returned herewith.)

(Deposition of L. J. Schage.)

Cross-Examination.

Q. (Mr. PRESTON.) Where was the ship when you made this entry in this log?

A. She was lying down the Sound.

Q. Where? A. Just after the collision.

Q. Where was the ship lying?

A. She was lying down below Point no Point.

Q. On which side?

A. Right in the middle of the Sound.

Q. Immediately after the collision you went off to the east side of the sound, did you not? A. No.

Q. Did you go to the west side?

A. No, I shaped my course for down the middle of the sound thinking that I would go down to Port Townsend.

Q. Well, was your ship in motion when you made this log entry, had you proceeded on your voyage?

A. I was coming back again when I made this log entry, coming back to Seattle after I turned around.

Q. When you were in the sound?

A. A little above Point No Point.

Q. How far did you go beyond Point No Point before you turned back?

A. I might have been a mile or a mile and a half probably just a little this side of Useless Bay.

Q. When you left Tacoma at 9:50 that evening, you started for San Francisco? A. Yes, sir.

Q. How did you come by Vashon Island?

A. To the eastward.

(Deposition of L. J. Schage.)

Q. The east passage? A. Yes, sir.

Q. That is the regular passage, is it not?

A. That is the regular passage.

Q. How many trips have you made from Tacoma to San Francisco with the "Lakme."

A. I have no record of it.

Q. Quite a number?

A. I have made so many I have not any record.

Q. Did you always use the east passage?

A. Mostly, sometimes I use the other passage?

Q. How frequently do you use the west passage?

A. Oh, I don't know, not very frequently.

Q. How many times have you ever used the west passage?

A. I went down there a couple of times before.

Q. After you had made temporary repairs on your ship at Tacoma, you started for San Francisco?

A. Yes, sir.

Q. How did you pass Vashon Island then?

A. Passed to the westward.

Q. What is your reason for going to the westward?

A. Well, I simply took a notion to go down that way.

Q. When you left Tacoma on that occasion, did you leave any word where you were going?

A. Well, I told them I was going down to get repairs.

Q. Where to?

A. To the Quartermaster's Harbor.

Q. To whom did you tell that?

A. I told it to several people around there.

(Deposition of L. J. Schage.)

Q. Well, did you intend to go to Quartermaster's Harbor?

A. I had that intention at first but changed my mind.

Q. When did you change your mind?

A. On my way going down.

Q. What time of day was it when you left Tacoma to go to San Francisco, after the temporary repairs had been made? A. About 7:30.

Q. In the evening? A. Yes, sir.

Q. And how far had you proceeded towards Vashon Island before you changed your mind?

A. Oh, I don't know, I was quite a distance down; I don't know how far it was.

Q. Is it not a fact that you left word at Tacoma that you were going to Quartermaster Harbor and then went down the Sound by the west passage for the purpose of eluding the process which might be issued against your vessel arising out of the collision and about which you have been testifying?

A. No, I did not know that had anything to do with the collision anyway, I think you are going beyond it.

Q. It may all be?

A. I don't know as you have any reason to ask me these questions. I think it is outside of your jurisdiction altogether.

Q. Well, we will find out about that. I understand you to say that you did not take that course for that purpose? A. No.

(Deposition of L. J. Schage.)

Q. But when you left Tacoma, you left word there that you were going to Quartermaster Harbor and that you honestly intended to go there for repairs?

A. I do not propose to answer that question.

Mr. PRESTON.—I move to strike out all the testimony of the witness unless he answers the question.

Mr. GRIGGS.—You only have to answer the question, Captain.

A. I don't know as that has anything to do with the collision. We are trying to find out who is in fault and how it occurred. I don't know that it has anything to do with the collision and what I done. I think this is simply my own business. I could go wherever I pleased; I could take the west passage or the east passage and it is nobody's business, and I do not think it has anything at all to do with the collision. I don't think I have got any right to answer that question, and I do not think that you have any right to ask me that question.

Q. Do I understand you decline to answer the question?

Mr. GRIGGS.—The Court will have to pass on that matter.

A. All right; let the Court pass on it.

Mr. GRIGGS.—The only safe thing for you to do is to answer the questions counsel asks of you.

A. Well, then, I thought it was a shorter passage and would have a better chance to get down quickly.

(Deposition of L. J. Schage.)

Q. (By Mr. PRESTON.) That was the only reason for going by the west passage?

A. That is all. My owners were very anxious to have the vessel down there, she was chartered and I had to be in a hurry to be back in Seattle on the 5th; we were chartered by the Yukon Transportation Company and I had to be in a hurry to be back, and I thought I would make a shorter cut by going through there.

Q. That is the only reason?

A. That is the only reason, yes.

Q. And when you left Tacoma on that occasion, did you really intend to stop at Quartermaster Harbor?

A. Well no, I did not.

Q. But it is true, as you stated before, that you left word with several people that you were going to stop at Quartermaster Harbor? A. Yes, sir.

Q. What distance do you say Apple Tree Cove is from Point No Point?

A. It is about seven miles, I should judge.

Q. Had the ship got in sight of Apple Tree Cove when you went below? A. Yes, sir.

Q. Did you go to sleep? A. I was asleep, yes.

Q. Did you remain asleep until the second mate came and roused you? A. What you mean?

Q. Did you remain asleep until you were roused?

A. Yes, sir.

Q. He came down to your cabin or stateroom?

A. He came down to my stateroom.

(Deposition of L. J. Schage.)

Q. And you were asleep when he came there?

A. Yes, sir.

Q. And he called you? A. Yes, sir.

Q. And stated to you that you were nearing Point No Point? A. Yes.

Q. And you got up immediately, did you?

A. I did.

Q. Looked out of your cabin window?

A. I looked out of the window and saw the light.

Q. Of Point No Point? A. Yes, sir.

Q. How far do you think you were from Point No Point, that is as you looked out and saw the light?

A. Oh, probably a mile or so.

Q. That is the way it occurred to you in looking out of the window?

A. Half a mile, I think closer than a mile; about half a mile.

Q. I say, as you looked out of the window what was the impression of distance that you had, discarding it entirely from what you saw when you got up on deck?

A. I should judge about—well, I did not take particular notice of how far the light might be off, but the position when I came on deck, I should judge the light would have been about two miles off, that is in the angle that we were off from the shore; a considerable distance, probably two miles from the "Lakme."

Q. What side of the ship does your cabin look out from?

(Deposition of L. J. Schage.)

A. Looks out on the port side; there are two windows, one on the starboard and one on the port.

Q. Which one did you look out of?

A. I looked out of the port.

Q. From your window you saw the light?

A. Yes, sir.

Q. How did the light bear?

A. I have no compass in my room to see how the light bore; I did not take the bearings of it.

Q. What would be your judgment of it without a compass, you can form some idea how the compass would be, how the light bore to you?

A. Well, I could by making a diagram, after taking the position of the vessel and the course I was steering, I could tell exactly how the light bore, but I did not do that.

Q. What is your best judgment, aside from accuracy, to be obtained by taking bearings to ascertain the position of the vessel?

A. It might bear about west from there, I should judge it would bear about west from there.

Q. You were only partially undressed as you lay down?

A. I was not undressed at all; I simply had my hat and coat off.

Q. That is partially undressed.

A. And my shoes and pants and everything else was on when I lay down.

(Deposition of L. J. Schage.)

Q. When you got up did you have any talk with the second mate?

A. I had no talk with him until I got on the bridge, no.

Q. Did you have any talk with him down in the state-room?

A. Yes, he told me that we were getting near the light; we were getting down toward the light; I says "All right; I will be on deck in a second."

Q. Any further conversation?

A. No, that was all.

Q. What did he do then?

A. He went on the bridge again.

Q. You put on your coat and hat and went on deck. You did nothing else; nothing else intervened?

A. I did not go on deck until the whistles.

Q. How long was it after he called you until the whistles blew?

A. Immediately; I do not suppose he got out on deck; on the bridge; it did not seem so to me.

Q. Did your ship answer the signals immediately?

A. It did.

Q. When you went down to lie down by Apple Tree Cove, who did you leave on deck.

A. I left the starboard watch on deck. The second mate and three men were on deck.

Q. These two men you called lookouts before did you not? A. Yes, sir.

(Deposition of L. J. Schage.)

Q. Where were they stationed when you went below?

A. They were on deck all the time, on the deckload.

Q. How large a ship is the "Lakme," what is her deck lengths?

A. I think she is about 200 feet over all.

Q. What is her beam?

A. Thirty-seven. I do not remember exactly how much over all.

Q. How large a deckload, how many hundred thousand feet?

A. We had about three hundred thousand feet on deck.

Q. Did that include the spars?

A. That included the spars—there was only one spar.

Q. That is the spar that you lost?

A. That is the spar that we lost.

Q. Where did that spar rest?

A. It rested angling across the deck; it was too long to go from the house forward, so I put it angling across.

Q. Did it protrude beyond the deck at either end?

A. Yes, it did, about two feet forward.

Q. On what side did it protrude?

A. It protruded on both sides.

Q. Forward on each side?

A. Protruded on both sides, laid at an angle across the deck.

Q. On which side was it furthest forward?

A. Well, about the same on either side—which side was it furthest forward?

(Deposition of L. J. Schage.)

Q. Yes. A. On the port side.

Q. How far did it protrude through on the port side?

A. About two feet, I should judge.

Q. How high was the deckload about the deck?

A. About ten feet.

Q. Was it uniform in height.

A. It was rather a small deck.

Q. Was it uniform in height?

A. Yes, it was uniform in height.

Q. That is, it was level on top? A. Yes, sir.

Q. When you got on deck you went immediately to the bridge after looking—where did you stand on the deckload when you first got on deck, on top of the deckload?

A. That is right outside of my door, I jumped right on the deckload, that is on the starboard side.

Q. You stood on the deckload?

A. I was not there a second, I did not stand there at all; I simply looked on the starboard side.

Q. You stood there long enough to look did you not, and the bridge was ahead of you? A. Yes.

Q. And what did you see as you looked from the deckload before you went on the bridge?

A. I did not see anything, that is the reason I jumped on deck.

Q. You saw neither the ship nor the tow?

A. No.

Q. Nor the mast lights of either? A. No, sir.

(Deposition of L. J. Schage.)

Q. Did you see the Point No Point light?

A. I did not see anything until I got on top of the bridge.

Q. When you got on the bridge you noticed first the tug, I suppose, being nearest to you? A. Yes, sir.

Q. She was then crossing your bow?

A. Yes, sir.

Q. Angling?

A. Angling. That is she was not going broad across the bow but came angling.

Q. Angling across the bow. She was heading eastward or southeast, was she?

A. She was heading southeastward.

Q. And what was her exact position as to your bow, as near as you can recollect it at that time?

A. Her course?

Q. No, the tug itself, was her amidships opposite your bow, or part of the bow opposite your bow, or astern?

A. She was just about ahead of me, coming angling position, that is the reason I did not see her when I looked from the starboard side. By the time I got on the bridge she was just angling across my bow.

Q. Had her bow crossed the line of yours?

A. When I got on the bridge she was just crossing.

Q. That is her bow as just crossing?

A. Her bow as just crossing when I got on the bridge.

Q. And the distance between you was thirty or forty feet?

A. Yes, I could not tell within ten feet.

(Deposition of L. J. Schage.)

Q. Did you see the ship at the same time?

A. I saw the ship, yes.

Q. Could you judge under what helm the ship was?

A. No, sir, I could not say.

Q. Do you know whether the tug was going ahead under engines or not at that time?

A. Yes, she was going ahead; I thought she was going ahead pretty fast. No doubt she was trying to pull the ship with her.

Q. Now it was not just at that moment that you ordered the engines stopped?

A. No, not right at that moment.

Q. It was after the tug had got clear across your bow?

A. Yes, sir.

Q. And you had got part way to the ship or the ship part way to you? A. Yes, sir.

Q. You think about two-thirds? A. Yes, sir.

Q. So that your bow was about one-third of the hawser distance from the ship?

A. Yes, that is about right.

Q. Then you ordered your engines to be stopped?

A. Yes, sir.

Q. What was the position of the tug at the time you gave the order to stop your engines?

A. She was then away up on her starboard side.

Q. How far?

A. Well, about two-thirds of the way from the ship and me, that would leave me about one-third from the

(Deposition of L. J. Schage.)

ship and two-thirds from the tug, with 120 fathoms of hawser out.

Q. How far was the tug distant from your side?

A. At the time?

Q. At the time you gave the order to stop the engines?

A. Well, she was about two-thirds away from the ship.

Q. I understand that, but her distance from your side?

A. I could not measure that; I do not suppose there is any man living can do that, to give the exact distance from that to my vessel.

Q. I could not expect you to do that—I would not think you were telling the truth if you did.

A. I do not want to tell anything that I cannot exactly say. I do not want to say I know the distance from the tug to me when I do not? I do not think any man living could do that.

Q. You certainly have some idea?

A. Well, I tell you, I was about one-third from the ship so I must have been two-thirds from the tug.

Q. That does not necessarily tell me how far the tug was away from your rail. I do not ask you to tell the exact distance, but give your best judgment, your best recollection.

A. You take a hawser 120 fathoms, and measure one-third of it from me to the ship and two-thirds from me to the tug and you will have my position right on that hawser.

(Deposition of L. J. Schage.)

Q. Yes, but I speak about the tug itself, the tug might have changed her course might she not.

A. The tug must have changed her course before she got to me. There was not time to change her course after she crossed my bow. She should have changed it before then.

Q. Had the bow of the tug got opposite the stern of your vessel at the time you gave the order to stop the engines?

A. I did not look astern to see if she had or not. I was looking ahead, the danger was ahead of me, it was not astern, I was looking ahead all the time.

Q. Well, how could you tell about the danger of fouling your screw without taking some observation of the necessary course of the cable?

A. I tell you, sir, if a ship crosses my bow, if a tug crosses my bow and I find him on my port side and another ship comes in tow of that and I have him on my starboard side, I am going to be darned close to that hawser; I know that without any observation at all, without looking at the hawser.

Q. And your only reason for not reversing your engines was the fear of entanglement of your screw with the hawser?

A. Yes, I knew there was no use in doing it.

Q. Did you think of it at the time?

A. I did think of it. I thought of it, and I thought that if I threw my vessel's stern around the ship would cut me right in two.

(Deposition of L. J. Schage.)

Q. When you got on the bridge you saw the mast light on the tug?

A. Yes—no, I did not see the mast light, I saw the green light.

Q. The green light of the ship?

A. I did not look up as far as that at all; I did not see his masthead light, simply saw his green light.

Q. What lights did you see on the ship?

A. I saw his light, I saw his red light, port light.

Q. Did you see his masthead light?

A. No, I did not see the masthead light of the ship; the ship don't carry any masthead light when she is towed.

Q. Did you see any people on board the ship?

A. I did not.

Q. At the moment of collision what people were on deck on your ship?

A. Well, there was no more than the watch on deck; the mate was below asleep.

Q. That is the first mate?

A. Yes. He was awake at the time and I sung out, I says, "We are going to have a collision," but it was done so mighty quickly I would not have time to call a cat.

Q. When you got on the bridge you gave some order at once? A. I did.

Q. What was it?

A. I asked the helmsman, "How is your helm?" "Hard-astarboard," he said. I says "Keep it there."

Q. Then what was the next order you gave?

(Deposition of L. J. Schage.)

A. The next order to the helmsman was to port the helm, put it hard-aport.

Q. I did not ask you if you gave the helmsman an order, I ask what was the next order you gave anybody?

A. I had no orders to give, there was no orders to give at any time, only the orders to the engineer to stop his engines.

Q. Did you give them? A. Yes, sir.

Q. Which did you give first, the order to port the helm or to stop the engines?

A. I stopped the engines and then ported my helm.

Q. That is you gave the order for the engines to stop, first? A. Yes, sir.

Q. Then you ordered the helmsman to port the helm?

A. Yes, sir.

Q. And did these orders succeed each other immediately?

A. They did. I had the affidavit of the engineer—

Q. Your stateroom window that you looked out of was above the deckhand? A. Yes, sir.

Q. Clear of the deckload. It gave a clear view above the deckload? A. Yes.

Q. This spar that you lost when did it go overboard?

A. As soon as we struck the ship, the end must have caught in his cutwater there, I presume.

Q. How much water was your vessel drawing as she left Tacoma that night?

A. She was drawing about 18 feet aft and 15 feet forward, 15½ nearly.

(Deposition of L. J. Schage.)

Q. You spoke in your direct examination of the water line, do you mean the actual line of the water or the water line on the ship?

A. I do not understand exactly what you mean by the water line. The water line of a vessel is when she is in ballast trim.

Q. How far above the water line itself was it that the cable was imbedded?

A. Well, I should judge about four or six inches from the water where the cable imbedded itself in my forefoot.

Q. The level of the water?

A. Yes, four to six inches; I could not tell exactly, I did not measure it, but it looked to me that the cable ran along my bobstay and cut right into the forefoot, because it was cut right underneath the bobstay.

Q. Did you noiice how far above the water the cable left the ship, or hawser left the ship?

A. No, I did not know anything about where the hawser parted on the ship at all; I did not know anything at all about it.

Q. I was not speaking of the parting, I mean where it left the ship, the point where it left the ship to go to the tug?

A. No, I do not know the exact distance from her topgallant forecastle down to the water; I do not know how far it is, I could not tell.

Q. You noticed that it was rather high forward?

A. Of course, the ship was in ballast.

(Deposition of L. J. Schage.)

Q. She is built high too, is she not?

A. I presume so; I did not have much time to look at her.

Q. Did you notice when, if at all, the tug stopped her engines?

A. No, I could not tell if she stopped her engines or when or anything at all about it.

Q. Did you notice when you struck the ship if she was in line with the tug or not?

A. No, she was not in line with the tug.

Q. How did you ascertain that without looking at the tug.

A. Why because the tug was crossing my bow and the ship was on my port bow and the tug will naturally turn quicker than the ship will in tow; that is a known fact without any ascertaining at all about it. The ship was not in line with the tug.

Q. Was the ship turning?

A. That I do not know. I could not tell.

Q. How soon after the collision did you examine the "Lakme's" lights?

A. There was one light knocked right out of kilter down on deck.

Q. What light was that?

A. The port light and the rest of the lights were all burning.

Q. How soon after the collision was it that you examined them? A. Examined them right after.

Q. Immediately after the collision? A. Yes.

(Deposition of L. J. Schage.)

Q. You had your masthead light all right?

A. Yes, sir.

Q. And the green light was all right? A. Yes.

Q. And the port light was knocked off?

A. The red light was knocked all to splinters.

Q. When you got on deck the second mate was on deck? A. Yes, sir.

Q. Who else did you see there on the deck of your ship?

A. I saw the two men of the watch, and I saw the fireman walking up and down the deck.

Q. Where was the fireman?

A. He was walking on deck forward of the pilothouse.

Q. Where were the two watchmen?

A. They were walking on deck—no, one was sitting down alongside the smokestack and the other one was walking up and down on deck.

Q. What is the name of the man who was by the smokestack? A. His name is Oscar Hanson.

Q. What is the name of the man walking up and down, this watchman who was lookout?

A. I do not remember.

Q. Which way was he walking when you got on the bridge, towards you or forward?

A. I could not tell you that. He was walking up and down the deck; I do not know whether he was walking forward or which way.

(Deposition of L. J. Schage.)

Q. Which way was the man sitting by the smoke-stack looking, forward?

A. Well, I did not take notice of that either. I could not tell whether looking forward or aft.

Q. Is Guilfoil still on the ship?

A. No, he is not.

Q. Where did he leave the ship?

A. He left in San Francisco.

Q. After you got down there and had been repaired?

A. He was in the ship until I left San Francisco, and then he stayed.

Q. You mean that is the occasion when you had repairs made in San Francisco?

A. Yes, he was there all the time the ship was there until I left.

Q. Did you discharge him or did he leave of his own accord? A. He left of his own accord.

Q. Did you know he was going to leave until he informed you that he was going to leave?

A. No, he got on a little tight down there and I guess that caused him to leave. He got a little more beer than he wanted.

Q. You did not discharge him? A. No, sir.

Q. You never told him that you were going to discharge him? A. No, sir.

Q. Did your ship get clear of the "Elizabeth" immediately? A. Yes, sir.

Q. Just fell back, did she, from the collision, they just naturally parted?

(Deposition of L. J. Schage.)

A. Yes, naturally parted, struck each other and glanced right off.

Q. Then which way did your ship go on?

A. Well, my engine was stopped until I found out what condition the ship was in.

Q. What was the "Elizabeth" doing while you were drifting?

A. Well, she was drifting around the same way; the hawser had parted.

Q. Which side of her did you go on after the collision?

A. I went on her port side.

Q. How far were you from her?

A. We were right close together when we struck.

Q. You did not strike the second time, did you?

A. No, sir.

Q. You managed to get out the second time without striking? A. Yes, sir.

Q. How far apart were you as you passed?

A. We ran right alongside, I guess, because her cathead took my forerigging out of me as we passed, so we must have been pretty close together.

Q. After the collision?

A. After we struck.

Q. After you got free from the collision?

A. No, it was done in the same instant, we struck each other about the cathead, it was done in the same instant and it tore my forerigging out.

Q. You struck and the vessels parted and you drifted on by her on her port side?

(Deposition of L. J. Schage.)

A. They were still going through the water and so were we and we passed each other.

Q. How far apart were you as you passed?

A. Well, it might have been five feet, might have been twenty, I could not tell.

Q. You did not notice that?

A. No. Of course they bounded apart a good deal like a rubber ball.

Q. When did the rest of your crew come on deck?

A. Came on deck immediately.

Q. Before or after the ships struck?

A. After the ships struck. They had not time to get up before the ships struck.

Q. When you came back to Seattle—you put into Seattle before you went to Tacoma?

A. Yes, sir.

Q. What time did you reach Seattle in the morning?

A. Some time after 11 o'clock if I remember.

Q. You then lodged a protest in the custom house with Capt. Bryant?

A. Not right off, I did not have any time to do it that day. I entered the protest the same day in the afternoon.

Q. Before you went to Tacoma?

A. Yes, sir—no, I did not. I did not enter the protest with Bryant until the following day when I came down, but I got my papers out the same day, that afternoon, and I went to Tacoma and discharged, started in dis-

(Deposition of L. J. Schage.)

charging part of my cargo, and I brought my men down here with me and entered my protest then.

Q You came down by some method of conveyance?

A. I came down by train.

Q. The next day did you say?

A. Yes, on Monday.

Q. What was the day of the collision?

A. No, I came down Saturday. The day of the collision was on Saturday, was it not? Yes, Saturday, I entered the protest. I have got my dates down, but my memory is a little dim with reference to the dates. On the 16th of April I entered my protest.

Q. The collision was on the 14th?

A. On the 14th in the morning.

Mr. PRESTON.—That is all with the exception that I reserve the right to recall the witness for further cross-examination upon his return, if Mr. Gilman desires to.

Redirect Examination.

Q. (By Mr. GRIGGS.) Who is the owner of the "Lakme"?

A. The St. Paul and Tacoma Lumber Company, Charles Nelson and Perry.

Q. Who is the managing owner?

A. Charles Nelson.

Q. Where does he live?

A. In San Francisco—no, Oakland in Seminary Park. I entered my protest the same day in the evening that I left Tacoma.

(Deposition of L. J. Schage.)

Q. I wish you would describe briefly how your bridge on the "Lakme" is constructed, whether it is a solid structure or what way it is constructed?

A. Well, it is constructed with stanchions, it goes right over my room. There is a house on deck first, there is about, I should judge from the main deck, it is about eight feet high or seven feet high, then there is my room, that is seven feet above that, and then the bridge goes right across my room.

Q. Does the bridge extend out over the aisles from side to side?

A. Not altogether. There is about three feet from the end of the bridge out to the rail on each side.

Q. Does the bridge extend to any extent beyond the top of your cabin? A. Oh, yes.

Q. On both sides? A. Yes.

Q. How far?

A. Just as far as the house goes, it extends right out to within three or four feet of the rail, from the main rail of the ship.

Q. When you came out of your stateroom to look over the starboard side of your vessel, on what were you standing on the main deck or on the deckload?

A. I was standing on the deckload.

Q. Was there any lumber or any portion of the deckload above or higher than you were, in the forward part of the ship? A. No.

Q. Was there anything to interfere?

(Deposition of L. J. Schage.)

A. The only thing was the height of the spar. Of course that spar was about 20 inches thick; that would be 20 inches from my feet up, lying on top of the deckload.

Q. How far was that ahead of you in the forward part of the ship?

A. It was not ahead of me at all on the side where I was looking, because the aft end was lying right close to me and the forward end was on the other side of the ship on the port side.

Q. Was there anything ahead of you on the deckload of the ship where you were standing at the time you first came out of the stateroom, to interfere with your vision to see whether there was anything ahead of the boat?

A. No, sir.

Q. You said the deckload was about ten feet high. What do you mean by that, was that ten feet above the main deck or ten feet above the bulwarks?

A. Ten feet above the main deck; between ten and eleven feet. I did not measure it exact.

Q. Above the main deck?

A. Above the main deck.

Q. How high were your bulwarks?

A. The bulwarks were about three feet and a half high, between three and four feet.

Q. How near to the deck of your bridge did the deckload come, or to the bridge?

A. The deckload was about between three and four feet below the bridge.

(Deposition of L. J. Schage.)

Q. Now, what portion of the hawser and cable that was fastened into your bow, was there anything except the wire cable, the wire hawser, any portion of the tackle?

A. No. Simply the shackle connecting it.

Q. Was that attached to the portion of your bow?

A. Yes.

Q. What kind of an arrangement was that?

A. Well, just a large shackle that connected the two together. I suppose it weighs about fifty pounds, probably.

Q. How far was that from either side of your bow?

A. It must have been right close to it, right close to the stem. In fact, I think that shackle must have caught the stem.

Q. Do you know on which side of your stem, whether starboard or port?

A. No, I am not quite certain about that, but I think it was on my starboard side. Part of my stem was tore right out, just split the two pieces.

Q. That is you think the shackle was on your starboard side? A. I think it was, I am not certain.

Q. What finally became of that portion of the hawser?

A. The mate cut it loose at the Arlington dock. I was lying at the Arlington dock the whole forenoon and they did not come after it. Everybody was gazing at it and I told the mate to let it go and I let it go. I did

(Deposition of L. J. Schage.)

not know then that they wanted it, but the captain of the tug said he wanted the shackle, he did not care for the hawser.

Q. He said that when?

A. He told me that afterwards, I met him on the street afterwards. He said he did not want the hawser but he wanted the shackle.

Q. Do you remember whether it was on Saturday or Monday, that you filed the protest, or Tuesday, do you remember the day of the week?

A. It was on Monday the 16th.

Q. Were you in communication with Mr. Nelson, the managing owner at all after the collision?

A. Yes, half a dozen telegrams.

Q. Did you receive any orders from him with reference to the necessity of haste in leaving the port of Tacoma and reaching San Francisco?

A. Yes, he told me to get to San Francisco as quick as possible.

Mr. PRESTON.—I object, it is not the best evidence.

Q. In what way did you receive that information, by letter or telegram? A. By telegram.

Q. Have you the telegrams with you?

A. No, I have not. He told me to consult with Captain Burns and do the best I could to get to San Francisco as quick as possible.

Mr. PRESTON.—I move to strike the answer as not the best evidence.

(Deposition of L. J. Schage.)

Q. Did you keep these telegrams or a copy of them?

A. I may have them on board; I do not know.

Q. Will you make search for them when you get on board so that if you have them you can produce them?

A. I will.

Mr. PRESTON.—I will waive the introduction of the log itself, but I would like to have it appear that there is no entry following the 14th of April until the 16th of April.

Mr. GRIGGS.—Very well.

United States of America,
District of Washington, } ss.
Northern Division.

I, A. C. Bowman, United States Commissioner for the District of Washington, do hereby certify that the annexed and foregoing transcript of testimony and proceedings, from page 131 to page 175, inclusive, was taken before me at the times and in the manner therein specified.

Each of the witnesses therein named, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth.

The signature of each of said witnesses to his testimony was duly waived by the parties, the testimony of said

several witnesses to be received with the same force and effect as if signed by said witnesses.

The exhibits offered by the libelant, and filed and marked by me Libelant's Exhibits , and the exhibits offered by the claimant, and filed and marked by me as Claimant's Exhibit No. 3 are returned herewith.

I further certify that I am not proctor nor of counsel for either party to said suit, nor interested in the result thereof.

In witness whereof I have hereunto set my hand and affixed my official seal, this 11th day of July, 1900.

[Seal U. S. Com'r.] A. C. BOWMAN,
United States Commissioner.

In the District Court of the United States, District of Washington, Northern Division.

QUEEN ELIZABETH COMPANY LIMITED,
Libelant,
vs.
Steam Schooner "LAKME," Her Boilers, etc.,
Respondent,
CHARLES NELSON,
Claimant.
No. 1708.

CHARLES NELSON,
Libelant,
vs.
British Ship "QUEEN ELIZABETH," and the Steam Tug "TYEE,"
Respondent.
No. 1710.

To the Honorable C. H. HANFORD, Judge of the Above-entitled Court:

Pursuant to the order of reference herein, and on this 8th day of October, 1900, the Queen Elizabeth Company, Libelant, Charles Nelson, claimant, and the tug "Tyee" one of the respondents, appeared by Messrs. Preston, Carr & Gilman, and H. S. Griggs and W. A. Peters, respectively.

Thereupon the following proceedings were had and testimony offered:

October 8th, 1900.

OSCAR HANSON, a witness produced in behalf of the Charles Nelson, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. PETERS.) Your name is Oscar Hanson?

A. Yes, sir.

Q. You were on the "Lakme" in the month of April last when she collided with the "Queen Elizabeth," were you not? A. Yes, sir.

Q. In what position were you—that is to say, what were you doing on the "Lakme"?

A. I reported the first light when I saw the tug—

Q. I mean what job did you have on the "Lakme," what did you do? A. I was lookout.

Q. How old are you? A. Twenty-five.

Q. How long have you been seafaring?

A. Fourteen years.

Q. What part of that time have you been on steam vessels?

A. I have been between London and South Africa.

Q. How frequently—about how long have you been engaged on steam vessels?

A. Mostly on steamers.

Q. Most of the fourteen years?

A. Yes, sir.

Q. How frequently have you been in and out of the waters of Puget Sound?

A. I never been up there—

Q. About how often before this trip, in April?

A. I was a couple of months down running between

(Testimony of Oscar Hanson.)

San Pedro and 'Frisco—that was the first time that I was on the coast.

Q. That is on the coast? A. Yes, sir.

Q. How often, before this trip in which the collision occurred, had you been in the waters of Puget Sound—had you ever sailed on those waters before?

A. No, sir.

Q. Where were you when the "Lakme" left Tacoma to go out on this trip?

A. I was working on deck—we left late at night.

Q. About what time, do you recollect, did you leave Tacoma?

A. I believe it was between eight and nine, somewhere along there, I am not sure.

Q. Where did the "Lakme" go then?

A. She was up the sound.

Q. Now, when did you first see the lights of the tug which you have spoken of?

A. I can't say, how far we were down—I can't remember how far we were down.

Q. Were you on watch when you left Tacoma?

A. We were all hands on watch at that time. The watch was set about twelve o'clock.

Q. Were you on the twelve o'clock watch?

A. Yes.

Q. Your watch, then, was from twelve until what time? A. Until four.

Q. About what part of the sound was the "Lakme"

(Testimony of Oscar Hanson.)

in when you first sighted the light of the tug which you have spoken of?

A. I don't know how far it was down, I am not acquainted with the places down there.

Q. I mean, was she in the middle of the sound or nearer the east shore or the west shore, or how?

A. I believe she was in the middle of it. I can't see any land on both sides—it was very near the same distance.

Q. How far from you was the light of the tug, which you saw, when you first saw it?

A. It was a good mile—it was about a mile.

Q. What lights did you see?

A. His mast light—the tug's mast light?

Q. After you saw the masthead light, did you see any other light?

A. Just after I reported to the second mate, I got an answer back, he said, "All right," and a couple of minutes I see the sidelights.

Q. What did you report to the second mate?

A. I sung out, "A light on the port bow—a bright light."

Q. Where was the second mate at that time?

A. On the bridge.

Q. What other men were on watch on the "Lakme"?

A. Except the man at the wheel.

Q. Who was at the wheel?

A. Hanson.

Q. Was the captain on deck or on the bridge?

(Testimony of Oscar Hanson.)

A. He came up the same time the whistle—he blows two whistles.

Q. How long after you reported the light on the port bow, was any signal given by any ship?

A. A few minutes after he gave us two whistles.

Q. Who gave?

A. The tugboat gave us two whistles first.

Q. What was done then?

A. We answer the two whistles back again and turned the wheel over.

Q. What way was the wheel turned when the whistle was given?

A. I was steering straight; after the whistle came he turned to the port, that called for hard-astarboard—it was turned to the port.

Q. You put your helm hard-astarboard?

A. Hard-aport.

Q. When the two signals came?

A. When the two signals came.

Q. How was your helm when you first saw the light?

A. It was straight, as far as I could see she was going along straight. After that we kept off to the starboard.

Q. What do you mean by, "You kept off to the starboard"?

A. Well, when we saw the bright light, we kept off.

Q. Which way did the "Lakme" head after the signal blew?

A. She was a couple of points, or a little off to go

(Testimony of Oscar Hanson.)

clear—going this way to go to starbard and when the whistle blew we turned the wheel and go another way.

Q. When you first saw her distinctly she was going towards the starboard, was she? A. Yes.

Q. Now, which side was the tug when you first saw her? A. On the port.

Q. After the tug blew her two whistles, did she make any change in her course?

A. Not before we come close to them, we make the change.

Q. What change did she make?

A. She turned the wheel to port too.

Q. What way did she come?

A. She came to cross our starboard bow.

Q. She came to cross your starboard bow?

A. Yes.

Q. How much room was there between the "Lakme" and the tug just before the signal was given to pass? I mean what was the distance apart—could you have passed if you had kept on—if the "Lakme" had kept on the way she was going and the tug kept on the way she was coming, before the signal was given, could you have passed?

A. We could have got very clear of her.

Q. How much clear water would there have been there?

A. There was a good distance, I could not say for sure.

(Testimony of Oscar Hanson.)

Q. You would have passed her in that case, or what quarter? A. On the starboard.

Q. On whose starboard would you have passed her?

A. On the right.

Q. The starboard of which vessel?

A. On the starboard of the ship if we had kept on the straight course.

Q. We are talking about the tug and the "Lakme," you know; would you have passed on the starboard of the tug or the port of the tug if you had kept on the way you were going?

A. We would have passed her on the port.

Q. You would have passed on the port of the tug, if you had kept on the way you were going? A. Yes.

Q. That is, your port would have been to her port?

A. Yes, sir.

Q. How long did it take your vessel, after the signal was given, to come near the tug, to get alongside the tug?

A. It was about a quarter of a mile.

Q. Did you hear any order given by the mate to the man at the wheel on the "Lakme"?

A. Yes, sir, he signaled, "Hard-astarboard."

Q. Do you know of your own personal knowledge whether the wheel was changed immediately?

A. Yes, sir, I turned myself around and I see this man was turning the wheel over.

Q. Did the ship, did the "Lakme" answer the wheel readily or not? A. Yes, sir.

(Testimony of Oscar Hanson.)

Q. How close did you come to the tug?

A. We were pretty close, we just happened to go clear of our bow.

Q. About how close, if you recollect, did you come to her stern, the stern of the tug?

A. Pretty close; I don't know how much that would be but it was pretty close.

Q. Did you notice who was on the tug?

A. I saw one man was aft there and the captain, I suppose, was there.

Q. Who else?

A. And I know the fellow at the wheel; I only see three of them.

Q. Was there anything said on the tug which you heard, as you passed them?

A. The captain sung out to the man on board the ship to cut his tow rope.

Q. Where were you with reference to the tug, when the captain sung out to cut his tow rope?

A. Just by the starboard forerigging.

Q. Now, what position was the ship, "Queen Elizabeth" in at the time that the signals were given by the tug?

A. He was steering right after the tug until the signals went.

Q. Now, when the signal was given and the tug went off to port, what did the "Queen Elizabeth" do?

A. She was keeping on right straight aft of the "Tyee"

(Testimony of Oscar Hanson.)

until she crossed our bow. At the time he crossed our bow he was steering his own course—the ship.

Q. That is the "Queen Elizabeth" was?

A. Steering the same course—steering straight across.

Q. Did you notice any change in her course at any time? A No, sir

Q. Do you know about how fast the "Lakme" was going when the signals were given first?

A. About eight miles, I believe;—she go at full speed —that is, I suppose she was going seven or eight knots.

Q. Did she change her speed at any time after the signal was given? A. Yes, sir, she stopped.

Q. In what manner?

A. She stopped at the same time she crossed her bow.

Q. What was she doing when she came into collision with the "Queen Elizabeth"—was she still or moving?

A. No, she was stopped.

Q. You were stopped?

A. Yes, and she was coming down.

Q. And who was coming down?

A. The "Elizabeth." She didn't stop at all before she struck us; that was the time she stopped.

Q. Who stopped?

A. The "Elizabeth." After she struck us on the bow it stopped his speed like.

Q. Where did you strike the "Elizabeth"?

A. We struck her on the port beam.

Q. Did you hear anything said on the "Queen Elizabeth? A. No, sir.

(Testimony of Oscar Hanson.)

Q. Did you say—when you stated that you first saw the light of the tug, what lights again did you see?

A. The port one I saw.

Q. That was a red light?

A. That was a red light.

Q. Could you see the starboard light at all?

A. Not until a few minutes afterwards.

Q. What lights, if any, did you see on the "Queen Elizabeth"? A. I see the red one there too, first.

Q. When did you first see the starboard light of the "Queen Elizabeth"? A. After the tug turned over.

Q. Where was your vessel with regard to the tug when you first saw the green light of the "Queen Elizabeth"?

A. She was going the same course as the vessel.

Q. How far were you from the tug when you first saw the green light of the "Queen Elizabeth"?

A. I don't know.

Q. Had you reached the tug or had you passed the tug or were you opposite the tug?

A. No, sir, before she crossed I see it—at the same time she crossed her bow I see the ship's green light.

Q. At the same time you crossed the bow of what?

A. The tug crossed our bow just a little bit before that.

Q. Did the tug make any change in her speed after the signal blew? A. No.

Q. Now, Mr. Hanson, which side of the tug did you

(Testimony of Oscar Hanson.)

see the lights of the "Queen Elizabeth," when you first saw them—that is, looking ahead, you say you saw the lights of the tug? A. Yes, sir.

Q. And also the lights of the "Queen Elizabeth"?

A. Yes, sir.

Q. On which side did you see the lights of the "Queen Elizabeth" first—on which side of the tug?

A. On the port.

Q. You saw the lights appearing over the port bow?

A. Yes, sir.

Q. Of the tug? A. Yes, sir.

Q. Do you know what time it was when this collision occurred?

A. By our clock it was about twenty minutes to four.

Q. You stated that the captain came on deck when the two whistles blew, do you know what he did or said—that is the captain of the "Lakme"?

A. No, sir, I could not tell you anything else except that he was singing out for one man on deck to look out for that spar—to go clear for that spar.

Q. What did you do besides reporting to the man on the bridge that the ship was off your port bow?

A. After I reported I was standing all the time until she come closer up, until I went down and called all hands.

Q. When was it that you went down and called all hands?

A. Just before we struck, just at the time she crossed our bow. We had our forecastle underneath the bridge.

(Testimony of Oscar Hanson.)

Q. Did the "Lakme" make any change in her course from the time that you first reported seeing the light on the tug to the time that the tug blew her two whistles?

A. Yes, sir, we were keeping on until he blowed his two whistles.

Q. Keeping how?

A. Keeping on the starboard to go clear.

Q. On whose starboard?

A. On the starboard side—to pass his port side.

Q. You were going so as to pass his port side?

A. Yes, sir.

Q. And you would pass port to port then?

A. Yes, sir.

Q. That is the way you were going until the two whistles blew?

A. That is the way we were going until the whistles blew.

Q. Had you made any change in that course at all?

A. No, sir.

Q. Up to that time? A. Up to that time.

Q. How long have you been on the "Lakme"?

A. I signed on her at Tacoma—I came aboard in Tacoma.

Q. On this trip? A. On this trip.

Cross-Examination.

Q. (Mr. GILMAN.) You have never been on a vessel in Puget Sound before? A. No, sir.

(Testimony of Oscar Hanson.)

Q. Now at the time that you saw the lights of the tug, did you see any other light?

A. I saw one ahead—it was on the land side.

Q. About how did it appear at that time?

A. That was on our right side—it kept on the right side of us.

Q. It was on your starboard?

A. It was on the starboard.

Q. You saw the light on the land? A. Yes, sir.

Q. That was a lighthouse or a beacon or a vessel, which?

A. That must be a light on shore—a lighthouse.

Q. How did that light bear off your starboard bow?

A. About three points.

Q. You saw a light about three points on your starboard bow? A. Yes, sir.

Q. Which you took to be a lighthouse?

A. Yes, sir.

Q. About how far away?

A. I don't know how far away it was.

Q. Was it farther away than the light of the tug?

A. Yes, sir.

Q. Very much farther away? A. Yes, sir.

Q. You saw no light on the land side off your port bow? A. No, sir.

Q. There was no light there? A. No, sir.

Q. Now, I understand you, when you first saw the mast light of the tug, she was about a mile away?

A. Yes, sir.

(Testimony of Oscar Hanson.)

Q. About two minutes after that you saw her side lights? A. Yes, sir.

Q You saw both of them?

A. I saw the red light first.

Q. And about two minutes after you saw her mast light you made out her sidelights? A. Yes, sir.

Q. And that was about the time that the tug gave the two whistles? A. Yes, sir.

Q. Now how far away do you judge you were when the tug gave the two whistles—about three-quarters of a mile? A. Not so much as three-quarters.

Q. A half a mile? A. About a half a mile.

Q. Your vessel immediately answered with two blasts of the whistle? A. Yes, sir.

Q. The tug immediately changed her course?

A. Not before she saw we had changed our course.

Q. You changed your course immediately?

A. Yes, sir.

Q. And then the tug changed her course?

A. Yes, sir.

Q. And then you were then about a half a mile apart?

A. Yes.

Q. The tug fell off very rapidly?

A. Yes, sir, she fell off rapidly.

Q. And your wheel was put hard to starboard?

A. Yes, sir, our wheel was put hard to starboard.

Q. Now, from that time on you could see only the green light of the tug, I presume?

(Testimony of Oscar Hanson.)

A. The red light first.

Q. You saw the red light first but after the tug fell off rapidly and you fell off rapidly you saw nothing but the green light? A. The green light.

Q. Now you could see nothing at that time but the red light of the ship?

A. After I see this starboard green light I see the red light and a little bit of the green.

Q. As soon as your course was changed?

A. Yes.

Q. Now you went directly across the stern of the tug did not you?

A. Yes, she was about all stern at the time she struck.

Q. Before you struck the ship you went across the stern of the tug? A. Yes.

Q. How was your wheel at the time you crossed the stern of the tug? A. I could not say.

Q. Was the wheel changed at any time after it was put hard-astarboard before you struck?

A. Not to my hearing.

Q. Could you tell from the course of the steamer whether the helm was changed?

A. At that time I could see that she was coming right straight after she changed hard-astarboard, she was coming right along all the time until he stopped her.

Q. Whether the wheel was changed at any time after it was changed hard-astarboard until you struck the "Queen Elizabeth"? A. No, sir.

(Testimony of Oscar Hanson.)

Q. So the wheel was hard-astarboard at all the time after you changed your course from the end until you struck? A. Yes, sir.

Q. Now, as I understand you, when you crossed the stern of the tug you saw the "Queen Elizabeth" directly behind the tug and you could see both lights plainly?

A. Yes.

Q. Both lights bore from your port bow about the same? A. Just about the same.

Q. How soon after the whistle blew before you saw the green light of the ship?

A. I saw it quick, I don't know what time it was.

Q. You saw it quite quickly, did you? A. Yes.

Q. Very shortly after you snswered the signal and put your course to the starboard, the green light of the ship showed? A. Yes, sir.

Q. So you saw that she was changing her course too?

A. Yes.

Q. Did the ship fall off rapidly to port?

A. She was keeping the same course that I could see from the time she crossed the bow.

Q. That was, she was keeping her course right after the tug?

A. No, sir, after she crossed our bow we never steered after the tug.

Q. How did you make out the green light then?

A. She came in a bit, that time when the tug turned over.

(Testimony of Oscar Hanson.)

Q. Now, as I understand you, just as soon, or shortly after you changed your course, you saw the green light of the ship? A. Yes, sir, I could see that.

Q. And you saw that all the time until you crossed the stern of the tug?

A. Not all the time before we came clear up we could not see it.

Q. When did it disappear—where were you when the green light of the ship disappeared?

A. I was going just right along here (illustrating) and seeing the tug crossed I could see the light of the ship; at that time we were going hard-astarboard, so our ship was coming down, and we went down and I could not see his green light until he came close up; until he come just a short distance on our bow I could not see at all the green light.

Q. Shortly after you changed your course for the starboard you could see the green light of the ship?

A. Yes.

Q. How long was it after that before you could not see her green light?

A. It was not long; just when we crossed the starboard stern.

Q. Then as I understand you, when you first changed your course the green light of the ship came in view?

A. Yes.

Q. And then a little while after that the green light disappeared? A. Yes, sir.

(Testimony of Oscar Hanson.)

Q. Now didn't you change your course at that time?

A. Not to my knowledge, I didn't take notice.

Q. Will you swear that your own course was not changed at that time?

A. I don't think that it was changed; I can't be sure of that because I saw—

Q. If her green light disappeared either you or the ship must have changed the course.

A. Yes—who changed I can't swear.

Q. And which one changed her course you can't swear you can't swear? A. No, sir.

Q. Now, Mr. Hanson, the green light of the tug, was visible all of the time after she changed her course?

A. Yes.

Q. There was not time that you could not see the green light of the tug until you went behind her stern?

A. No, sir.

Q. She was sailing apparently on about an opposite course to you? A. Yes.

Q. How far did you go past her stern before you stopped?

A. We stopped at the same time he crossed our bow.

Q. You stopped at the same time he crossed your bow immediately? A. Yes.

Q. Did you stop before you struck the ship?

A. Yes.

Q. Did you reverse? A. Yes.

Q. Then your ship was reversing at the time she

(Testimony of Oscar Hanson.)

struck—the "Lakme" was reversing at the time she struck the ship? A. Yes.

Q. Did you strike the ship straight on or a kind of glancing blow?

A. A kind of glancing blow on the beam.

Q. Do you know whether the course of the "Lakme" was changed so as to make it strike a glancing blow?

A. Yes, she was changed—do you mean whistled?

Q. I mean the helm; whether the helm had been changed before the blow was struck?

A. No, I can't say.

Q. You can't say whether it was? A. No.

Q. Was the wheel turned forward again—I mean the propeller turned forward again before the blow was struck? A. Not to my knowledge.

Q. Now if I understand you correctly, you were a half a mile apart when the signal was given to pass?

A. Yes.

Q. That the green light of the tug immediately came in view? A. Yes.

Q. And the green light of the ship immediately came in view? A. Yes.

Q. And a short time after that the green light of the ship disappeared? A. Yes.

Q. But the green light of the tug was still in view?

A. Still in view.

Q. (Mr. HUGHES.) What part of the "Lakme" were you on?

A. Between the foremast and the bridge.

(Testimony of Oscar Hanson.)

Q. Between the foremast and the bridge?

A. Yes, just where the lumber was lying on the deck.

Q. Were you standing on the deck?

A. Yes, sir, on the deck's load, in the lumber.

Q. How high was that above the deck?

A. The lumber was about three or four feet on the top of the rail.

Q. Were you standing as high as the officer on the bridge? A. Not quite so high.

Q. How many feet were you forward of him?

A. Thirty-six or forty feet from the bridge to where I was.

Q. Did you report the tug as soon as you saw her?

A. Yes, sir.

Q. What report did you give, what did you say?

A. I sung out, "A bright light on the port bow," to the second mate and he answered me and he said. "All right."

Q. He was on the bridge? A. The second mate.

Q. Did you make any other report? A. No, sir.

Q I wish you would tell just what lights you saw ahead of you? A. Yes, sir.

Q. What light did you see when you first reported the light ahead of you?

A. I saw the bright light and his red a few minutes, a few minutes after, and the green, on the tug.

Q. You saw the light on the masthead?

A. Yes, sir.

Q. And you saw the green and the red light?

(Testimony of Oscar Hanson.)

A. The green light on the tug.

Q. On the tug?

A. Yes, sir; I saw the red and then I could not see the green.

Q. Did you see more than the bright light on the masthead; did you see any other lights on her? A. No.

Q. You just saw the three? A. Yes.

Q. The bright light on the masthead and first the red light? A. Yes, and then the green.

Q. The ship must have been a couple of miles away when you saw it first? A. About a mile.

Q. It was a pretty clear, moonlight night?

A. It just started to clear up nicely at that time.

Q. The sky was clear? A. Yes.

Q. And the moon was shining?

A. I don't remember.

Q. The stars were shining? A. Yes.

Q. There was not anything to interfere with your seeing the light a good distance off, was there? A. No.

Q. Did the mate give any order to the man at the wheel when you first reported the light?

A. Yes, he told him to keep her off to port; to keep her off a little, and sung out, "Port abit," that means to go to the right, to the starboard.

Q. Now, how long after that was it that the tug gave you the two whistles? A. It was not long after.

Q. A very short time after you first saw it?

A. Yes.

(Testimony of Oscar Hanson.)

Q. Then it must have been pretty nearly a mile away when the tug whistled to you? A. No, sir.

Q. Somewhere between a half a mile and a mile, I should judge from your statement? A. Yes.

Q. And the tug gave two whistles? A. Yes.

Q. Did the "Lakme" immediately answer back the two whistles? at the same, right after the tug?

A. Right after the tug.

Q. You did not wait until he answered; just at once?

A. Just at once.

Q. Did you hear anybody give any orders as to whistles?

A. Except I hear the signal man sing, "Hard-astarboard," to the man at the wheel.

Q. Immediately after your ship gave the two whistles in answer to the tug, the second mate sung out what?

A. "Hard-astarboard."

Q. Immediately? A. Yes.

Q. Did you hear him give any orders?

A. No, sir.

Q. Did you hear him after that, say anything to the man at the wheel?

A. No, sir, I didn't hear anything at all; the captain came up at the same time that he gave the answer to the whistle.

Q. The captain came right up after the answer was given? A. Yes, just at the same time.

Q. Did the captain give any orders?

A Not that I could hear.

(Testimony of Oscar Hanson.)

Q. You did not hear the captain give any orders from that time on? A. No, sir.

Q. You did not hear the mate give any orders from that time on?

A. I only heard, "Hard-astarboard."

Q. The only order you heard given was, "Hard-astarboard"? A. Yes.

Q. Did you hear any bells for stopping the engine?

A. Yes, the bell answered.

Q. Did you hear any bells for starting her up again?

A. I did not hear any.

Q. You did not report the light which you saw off on your starboard bow, that was on the land?

A. That was long before.

Q. You reported that before you reported the ship?

A. Yes.

Q. You saw that before you saw the ship?

A. Yes.

Q. It was still farther away than the ship?

A. Yes.

Q. Did you see it before you saw the tug's light?

A. Yes.

Q. And then after you had reported that, the next thing you saw was the tug's light and you simply reported that? A. Yes.

Q. Now you did not report seeing the lights of the ship behind the tug, did you?

A. I saw it but I didn't report it.

(Testimony of Oscar Hanson.)

Redirect Examination.

Q. (Mr. PETERS.) Mr. Hanson, when you called all hands on deck where did you go to call them?

A. Just to the forecastle door.

Q. Did you go down in the forecastle?

A. No, sir, I was not down; I stopped on the deck and sung out, "All hands on deck."

Q. Where were you off the tug at that time?

A. The tug was just about abreast and he was on our starboard side and that was the time I called, "All hands on deck," I saw that there would be something wrong.

Q. Did you change your position on the "Lakme" after that?

A. No, sir, I just stand right between the bridge and the forepart—I was standing just on the deck at the time the ship struck us.

Q. Whereabouts on the deck were you standing, were you forward of the foremast?

A. The aftpart of the foremast.

Q. You were after the foremast? A. Yes, sir.

Q. Now, how far were you from the bridge at that time? A. As soon as she struck?

Q. Yes.

A. Between the foremast and the bridge, just amidships just in the forepart of the spar.

Q. When you first sighted the light were you forward of the spar? A. Yes, forward of the spar.

Q. Then you must have changed your position after

(Testimony of Oscar Hanson.)

you first reported the lights, and between that time and the time that you struck the "Queen Elizabeth," you must have changed your position, you must have gone aft on the ship? A. I came farther aft.

Q. When did you do that?

A. Just before she struck; I was walking along aft; I was right in the forward part and I was going along aft before she struck, and when she struck I just turned around, I was watching that yard there after that, to see it come down.

Q. What yard?

A. That yard on the "Lakme" was broke in two pieces, and I went farther aft because I was afraid something would happen to come down.

Q. Why did you call, "All hands on deck"?

A. Yes, it was just at the time, we wanted to call the men, we always called them at a quarter to four and this was just a few minutes before, and I thought there was going to be something, and I called them.

Q. Nobody ordered you to? A. No, sir.

Q. You saw there was going to be some trouble and so you called them?

A. The captain told me—he said, "That is all right," when he heard me, nobody told me to call them.

Recross-Examination.

Q. (Mr. HUGHES.) You said you heard the captain of the tug tell the mate to cut the tow-line?

(Testimony of Oscar Hanson.)

A. Yes, sir, to cut the tow-line; I heard him sing out twice.

Q. Did you see the mate go back there?

A. No, sir; he sung out to him on board the ship.

Q. Sung out to you?

A. No, sir, sung out to that fellow on the ship.

Q. To cut the tow-line? His tow rope.

Q. He didn't order anybody on the tug to cut it?

A. No, sir.

Q. Did you notice when you struck that tow-line?

A. Yes, sir.

Q. How far were you, how near to the ship, how near to the "Queen Elizabeth"?

A. After the tug carried away the rope; there were about three or four fathoms of rope on the port side, after the rope was carried away.

Q. You struck that hawser and parted it on the stern of the tug, didn't you? A. Yes, sir.

Q. Now, the steel part of the hawser caught on the nose of your ship, didn't it?

A. Just about close to the knuckle—

Q. And it caught right into the nose and it held fast there? A. It held fast there, yes, sir.

Q. And then when your ship had gone a little further along and the strain came on, it parted the hawser on the ship, didn't it? A. Yes, sir.

Q. So that it first parted the hawser just off the rail of the tug? A. Yes, sir.

(Testimony of Oscar Hanson.)

Q. And then it caught into the nose on your ship and held fast there? A. Yes, sir.

Q. And when your ship got far enough along to stretch hard on it again it parted the steel wire right up close to the "Queen Elizabeth"? A. Yes, sir.

Q. And that hawser hung on the nose of your ship and caught right into the nose? A. Yes, sir.

Q. Until you came into Seattle?

A. Right close to the wharf.

Q And you let it drop into the sea?

A. No, sir, it clung into the nose of our ship until we came right alongside the wharf.

Re-redirect Examination.

Q. (Mr. PETERS.) Do you recollect seeing the hawser parted the second time, that is, after the hawser caught on the nose of your vessel, do you recollect seeing it parted a second time? A. No, sir.

Q. All you know is that after the collision, a part of the cable hung on the nose of your boat?

A. Yes, sir.

Q. And that is why you think she parted?

A. Yes, sir.

Q. You didn't actually see it? A. No, sir.

Q. (Mr. HUGHES.) But you noticed from the strands that had broken that it was not cut off next to the ship?

A. It was broken, yes, sir.

Q. (Mr. PETERS.) What nationality are you?

A. Norway.

(Testimony of Oscar Hanson.)

Q. And how long have you been in this country?

A. About three years and a half, I have been under the American Flag.

Q. (Mr. GILMAN.) How long have you spoken English? A. I have been sailing for six years.

Q. You have a good command of the English language, pretty good, haven't you? A. Yes. sir.

Q. So that you understand everything that is said to you in English? A. Yes, sir.

(Testimony of witness closed.)

Mr. PETERS.—It is understood that in this case the signature of the witness to his testimony is waived.

Mr. GILMAN.—That's all right.

TESTIMONY ON BEHALF OF PUGET SOUND TUG-BOAT COMPANY.

February 26th, 1901, 10 A. M.

Continuation of proceedings pursuant to adjournment.

All parties present as at former hearing.

(On motion of proctor for claimant and respondent, the witnesses are put under the rule and excluded from the presence of the witness on the stand.)

TENNAS OLSON, called as a witness in behalf of intervenor, being first duly cautioned and sworn, testifies as follows.

Q. (Mr. HUGHES.) How old are you, Mr. Olson?

A. Thirty-four.

Q. What is your business? A. Seafaring.

(Testimony of Tennas Olson.)

Q. How long have you been a seaman?

A. Since I was fifteen years of age.

Q. What position do you hold now?

A. I have been decking on the "Alice Gertrude" this last month.

Q. Have you been a pilot in these waters?

A. Yes, I was on the "Garland" up to Christmas.

Q. How long have you been a pilot in Puget Sound waters? A. Since 1898, in April.

Q. Did you ever have a mate's license?

A. No, sir; a second-class pilot's license—they don't issue mate's licenses now.

Q. You say they don't issue any mate's licenses for sound ports? A. No, sir.

Q. Were you employed on the tug "Tyee"?

A. Yes.

Q. In 1900? A. Yes.

Q. How long were you on the "Tyee"?

A. I was on her eleven or twelve days; I don't know exactly, eleven or twelve days.

Q. Were you on her in April last at the time of the collision between the "Lakme" and the "Queen Elizabeth"? A. Yes, sir.

Q. What position did you hold on her?

A. The same position, pilot or mate.

Q. The mate's on those tugs hold pilot's licenses, do they? A. Yes.

Q. On Puget Sound waters? A. Yes.

(Testimony of Tennas Olson.)

Q. Where did you pick up the "Queen Elizabeth," and when—where and when? A. Wasn't it in April?

Q. On the 13th of April, wasn't it? A. Yes.

Q. About midnight? A. Yes.

Q. The 13th of April, 1900? A. Yes.

Q. Where did you pick her up?

A. In Townsend.

Q. Where were you taking her to?

A. Blakeley.

Q. From Port Townsend to Port Blakely?

A. Yes.

Q. Were you the officer on deck after leaving Port Townsend? A. I was.

Q. And up to the time of the collision? A. Yes.

Q. Did you see the lights of the "Lakme" ahead of you? A. I did.

Q. When did you first see them?

A. I saw them about ten minutes after passing Point No Point, about four miles ahead.

Q. What course were you steering after passing Point No Point?

A. South-southeast on the pilot-house compass, on the "Tyee's" compass.

Q. South-southeast? A. Yes.

Q. How did you see the lights of the "Lakme" when you first observed them?

A. Well, I saw them right ahead.

Q. What lights did you see?

A. I saw the green and the red light, once and a while

(Testimony of Tennas Olson.)

she would close in the red and once in a while she would close in the green—she was not steering very straight when I saw her.

Q. Now did you at any time give her any signal?

A. I did.

Q. What light was she showing when you gave the signal? A. Showing the green light.

Q. About how far out from you was she at the time you gave the signal? A. About a mile or so.

Q. What signal did you give?

A. Two whistles.

Q. What were your reasons for giving that signal?

A. Because I wanted to pass her on my starboard bow because I had a ship in tow and it was more safer for me—I could not go inside, it was not safe to go inside of her.

Q. Why was it not safe to go on the inside of her?

A. Because I did not think there was water enough I didn't think.

Q. How far were you off shore?

A. About three-quarters of a mile; somewheres like that; I passed Point No Point very close.

Q. How was the tide at that time?

A. Well, the tide changed about just off Point No Point, and it was then about ten minutes after that until I blew my signal and gave the whistle.

Q. Which way was the tide then?

A. The same tide; going down; and you will always

(Testimony of Tennas Olson.)

see the tide sets you in on the south shore; on the ebb tide.

Q. The ebb tide, sets you in towards the shore?

A. It sets you in towards the shore.

Q. Was the "Queen Elizabeth" a large boat?

A. Yes.

Q. Was she laden or light? A. She was light.

Q. What whistles did you give?

A. Two whistles.

Q. Did the "Lakme" make any answer?

A. Yes.

Q. What answer did she give? A. Two whistles.

Q. What order, if any, did you give your quartermaster at that time?

A. I told him to starboard.

Q. Now, up to the time when you gave that order, had you been continuing on this course?

A. Yes; I had never changed my course at all until he answered the two whistles, after leaving Point No Point, and then she was porting after she answered the whistles and I said to him "Hard to starboard," and she swung off.

Q. After she came closer to you how was she bearing?

A. She was bearing more to us then; when she came closer to us she showed the red light again and I sung out to her, "Are you crazy or what? Starboard your helm! Starboard your helm!" and the captain came out.

Q. Your captain? A. Yes.

Q. Captain Bailey?

(Testimony of Tennas Olson.)

A. Yes, Captain Bailey.

Q. Did you call Captain Bailey?

A. No, sir, I did not.

Q. When you made that outcry he came out?

A. There was no time to call him; I had enough to attend to when I saw the way he was coming.

Q. How did the "Lakme" proceed after you sung out?

A. She steadied up more then, because if he had kept on swinging on his port helm again he would run into us, but he seemed to steady up then.

Q. Did she pass you?

A. She passed us, yes.

Q. How did she pass you?

A. She passed us a ship's length or two from the stern of our boat.

Q. What happened then?

A. She struck the wire and ran into the ship.

Q. Struck what wire? A. The tow-line.

Q. She picked up the— A. — tow line.

Q. Your hawser? A. Yes, sir.

Q. And after that you say she ran into the ship?

A. Yes.

Q. How did she collide, with the "Queen Elizabeth" or what with?

A. Yes; she ran into her port bow.

Q. What happened then,

A. There was a big blast of fire when she ran into it.

Q. Did your hawser part?

(Testimony of Tennas Olson.)

A. The hawser parted, yes; she picked the hawser up.

Q. About the time of the collision or just before was it that your hawser parted?

A. Just at the collision the hawser parted, I guess it was a little distance between, just as I spoke she slipped along the wire and struck right away; you could not tell that exactly; you could not tell, you were so close.

Q. About how much time elapsed Mr. Olsen after these whistles were blown by the tug and the "Lakme" before this collision occurred?

A. There was about four minutes I should imagine—about four.

Cross-Examination.

Q. (Mr. GRIGGS.) Where were you standing on the tug? A. I was in the pilot-house.

Q. Was there anybody else in the pilot-house with you? A. Yes.

Q. Who? A. The quartermaster.

Q. What was his name? A. Oscar Anderson.

Q. Was there anybody else in there? A. No, sir.

Q. Was there anybody else on deck?

A. No, except the engineer.

Q. Except who?

A. The second engineer; of course I did not see him, but he was standing at the door.

Q. You did not see him though?

A. No, I did not see him, because I could not see him. I was looking ahead, but he was there.

(Testimony of Tennas Olson.)

Q. Was there anybody else on the deck ahead of you could see? A. No.

Q. Do you remember what time it was the collision occurred?

A. Yes, it must be close to a quarter to four, or something like that.

Q. Do you remember what time it was you left Port Townsend?

A. It must be close to one o'clock or so when I left there.

Q. You had noticed Point No Point light when you went by it, did you?

A. Yes, it was after one o'clock; it must be two o'clock. It only took us about two hours to get up there and it must be close to two o'clock.

Q. How long was it after you passed Point No Point light before you saw the "Lakme's" light?

A. About, I saw it right away as soon as I came around.

Q. You did not see her before?

A. No, I did not; just as we swung around I saw the lights?

Q. How far away was she then?

A. She was ahead, about three or four miles.

Q. When you swung around Point No Point then your course lay practically down the sound?

A. Made my course right for Appletree Cove.

Q. And your course lay right down practically parallel with the shore, didn't it? A. Yes.

(Testimony of Tennas Olson.)

Q. How near the middle of the sound did your course lay?

A. Well, we laid close to shore, close to this shore.

Q. You were much nearer the west shore than the east?

A. To the south shore—yes, to the west shore or south, whatever you would call it—to this shore.

Q. How much nearer were you to the Point No Point shore than to the other?

A. I could not tell you. Christ! I must be ten times all right, whatever the distance is across there; it must be about eight or ten miles across, and I was three-quarters of a mile off shore.

Q. You were not more than three-quarters of a mile off shore?

A. About three-quarters of a mile as near, as I can recollect.

Q. You say you saw both lights of the "Lakme"?

A. Yes.

Q. The red and a green?

A. She swung off and sometimes I would only see one; and first I saw the green; and then I would see the red, of course when she came close up I saw them very plain.

Q. The ship, the "Queen Elizabeth," was following in your course? A. Yes, right behind.

Q. And she followed directly in your course until after you changed.

Q. Of course I was not looking astern when I swung

(Testimony of Tennas Olson.)

off and said "Hard to starboard," I was looking ahead of her then, she was right behind.

Q. Who was your assistant engineer?

A. Harry Flint.

Q. Did you see him about the time the collision occurred or hear him say anything?

A. Well, I think I heard him; he was talking, I heard his voice, but I did not see him.

Q. Do you know who he was talking to?

A. No, I don't.

Q. Did you hear what he said? A. No.

Q. Do you remember when it was when you heard him talking? A. If I heard him—

Q. If you heard him talking do you remember when it was you heard him talking?

A. At the same time as the collision.

Q. Was it before or after the whistles were blown?

A. That was after the whistles were blown.

Q. How long after?

A. Just at the same time; I saw him in the window, but I saw him in the door a little before I blowed the whistles too.

Q. You saw him in the door before you blew the whistles? A. Yes, and after too.

Q. Did you hear him say anything to the chief engineer? A. No, sir, I did not.

Q. Do you know about what speed you were making?

A. Yes, we were making about eight or nine knots.

Q. When did you get your license as pilot?

(Testimony of Tennas Olson.)

A. In 1898.

Q. From whom did you get that?

A. Captain Bryant.

Q. Do you know the Puget Sound waters very thoroughly? A. I do, sir.

Q. Do you know the shore from Point No Point down to Appletree Cove? A. I do.

Q. Are there any shoals along that shore?

A. Yes, sir.

Q. How far do those shoals extend?

A. Well, there is a shoal from Point No Ponit up to Pilot's Point pretty near, a little point there and there is a shoal right along up there.

Q. How far out into the sound does that extend?

A. A quarter of a mile or something like that.

Q. About how far?

A. About a quarter of a mile, I should think.

Q. You say the tide had just turned?

A. The tide turned off Point No Point because I felt the current.

Q. You say the tide had just turned before the collision or when? A. Before the collision.

Q. About how long before?

A. Well, of course you could not say exactly; it must have been about half an hour or so.

Q. Did you notice when the tide turned?

A. Well, I felt the tide when I was going around Point No Point I felt some ripples on the boat, and you

(Testimony of Tennas Olson.)

could see in the water; it makes a little move more when the tide turns.

Q. You knew the tide had turned as you swung around Point No Point?

A. I knew the tide was ebbing then, going the other way.

Q. How long before this collision had you been employed on the tug?

A. I have not got that exactly down; it was seven or eight days, I think, and I was on board four days after that until the man came back?

Q. Were you the regular mate of the tug?

A. Yes—what do you mean—I was officer—I was running the boat when it happened.

Q. Were you the regular officer on board the boat or had you been employed to take somebody's else place temporarily? A. I had—I took a man's place.

Q. What was the matter with him?

A. Well, the captain he hired me, but he hired me to take the mate's place, but not for steady.

Q. How much longer did you stay with the tug after collision?

A. I knew we made a trip down to the cape from Tacoma again with a ship; I don't know exactly how many days I stayed after that; three or four days or something like that; I was not there very long; I was only there two weeks altogether, I think it was.

Q. What were you doing just before that when the captain hired you; were you employed?

(Testimony of Tennas Olson.)

A. I was on the "Alice Gertrude" for one trip—pilot on the "Alice Gertrude."

Q. And when did that trip cease; when did you leave the "Alice Gertrude"?

A. I have not got those things all down; it was only a few days before I went, I could not tell you, but it was a little before. I have not got the things down as far as that's concerned.

Q. And what are you doing now?

A. I have been deckhand on the "Alice Gertrude" since the first.

Q. Have you been acting as pilot on any other boats recently?

A. Yes, since ever I got my license.

Q. Since this collision have you been acting as pilot?

A. Yes, I have been on the "Garland" since and I have been on the "Boyden" since; I was on the "Garland" up to Christmas for a couple of weeks or two and I was two months on the "Boyden."

Q. Were you ever in the employ of the Puget Sound Tugboat Company before this? A. I was.

Q. When was that?

A. Up to the last eight or ten months—I was working for them four years.

Q. In what capacity had you been employed by them?

A. Well, I was mate on the "Holyoke," mate or pilot —there is only one kind of license, you can't get mate's license any more—there is only one kind of license. I was mate with Captain Clinger nine months, and I was

(Testimony of Tennas Olson.)

quartermaster with Captain Bailey for about two years, I was with him a year and a half or something like that.

Q. How long is it since they have stopped issuing mate's licenses on Puget Sound boats?

A. It must be pretty near three years, I don't know exactly; but when I was up there at that time I got mine, they would not give any mate's licenses; all the mate's licenses had to be taken up so soon as the time was up and you had to go up there again for an examination for a pilot's license, it was a little before that I got mine.

Q. About how far away was the "Lakme" when you blew the two whistles?

A. She was off about a mile, I suppose.

Q. She was about a mile off?

A. Yes, sir, as near as I could judge.

Q. About how long was it after you first saw the "Lakme's" lights before you blew the two whistles?

A. Before I saw the "Lakme's" lights, three or four miles, it must have been about twenty minutes I should say.

Q. About how long?

A. I didn't take the time you know, but when first I saw her she was ahead of me about four miles and then I blowed my whistle as she came about a mile away from me, and of course I can't get the time, I don't know, but I suppose it must have been about four minutes or something like that when I blowed, something like that.

Q. How close did the "Lakme" pass to you?

(Testimony of Tennas Olson.)

A. When she struck?

Q. When she went by?

A. She passed about a ship's length or two, about three hundred feet or so from our stern, perhaps a little more.

Q. Was there any wind that night?

A. Yes, there was a little light southeast wind.

Q. But not enough to make any sea?

A. No, no; just enough to drive the smoke ahead.

Q. Have you any idea how long after you had changed your course it was before you yelled out to the quartermaster to starboard?

A. Before I changed my course?

Q. After you changed your course?

A. When I blowed the whistle I said to the quartermaster, "Starboard your wheel!" and then she swung the opposite way.

Q. Who, what—what swung?

A. The "Lakme" swung the opposite way and I sung out to them "What's the matter with you?" I said, "Are you crazy? Hard to starboard!" I said, and then I replied to the quartermaster, I said, "Hard to starboard!" and he said, "It is hard, all right, sir,"—on the "Tyee."

Q. Then at first you say the "Lakme" seemed to be swinging in the wrong direction? A. Yes.

Q. After you changed your course?

A. Yes, that was the time I sung out when I noticed she came that way.

Q. You noticed that at once?

(Testimony of Tennas Olson.)

A. Yes, she came towards us—she should have kept her wheel—

Q. Just as you yelled, she changed her course again?

A. No, she didn't change, but she seemed to be steadying up a little the way it looks to me—it came in a hurry and she didn't seem to be stopping or anything.

Q. Could you see who were on the "Lakme's" deck at that time? A. I could not see; no.

Q. Could you see anybody on her?

A. I could not see.

Q. Did anybody answer you when you yelled to them?

A. No.

Q. When you did yell out to them, about how far away was it—could you tell? A. It was not very far.

Q. About how many feet?

A. It must have been a thousand feet, more or less, I suppose.

Q. She was more than a ship's length away?

A. She was more.

Q. Could you have been heard on the "Lakme" if there was somebody there listening?

A. Yes, sir, he could hear me—well, it is hard to tell, but I think I sung out loud enough, but she must have been off about four or five ship's lengths the way it looked to me at that time.

Redirect Examination.

Q. (Mr. HUGHES.) You say Captain Bailey employed you temporarily to take the place of the mate Mr. Williams while he was sick? A. Yes.

(Testimony of Tennas Olson.)

Q. And you only stayed there until Mr. Williams got well and came back? A. Yes.

Q. What kind of a night was it, clear or dark?

A. It was a fine night—the finest kind of a night.

Q. Clear? A. Yes, sir.

(Testimony of witness closed.)

OSCAR ANDERSON, produced as a witness in behalf of intervenor, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. HUGHES.) Give your full name.

A. Oscar Anderson.

Q. What is your business, Mr. Anderson?

A. Seaman.

Q. Are you an able seaman? A. Yes.

Q. How long have you been a seaman?

A. Well, I have been going to sea *often* and on for about sixteen years.

Q. How long have you been on Puget Sound waters?

A. Well, I've been here a little over a year.

Q. Where have you been employed?

A. I am employed by the Puget Sound Tugboat Company.

Q. What was your position with the Puget Sound Tugboat Company last April?

A. Quartermaster on the tug "Tyee."

Q. How long had you been on the tug "Tyee" as quartermaster prior to that time?

(Testimony of Oscar Anderson.)

A. I must have been on her about two months or a little more.

Q. Who was the master of the "Tyee" at that time?

A. Captain Bailey.

Q. Do you remember the circumstance of the collision with the "Elizabeth" in tow of the "Tyee" on the morning of the 14th of April last when you collided with the "Lakme"? A. Yes.

Q. Where did your tug pick up the "Queen Elizabeth?" A. Port Townsend.

Q. About what time of night was it?

A. About twelve o'clock or a little after.

Q. What kind of a boat was the "Queen Elizabeth"?

A. She was a full rigged English ship.

Q. A large or a small ship? A. A large ship.

Q. Laden or in ballast?

A. She was in ballast.

Q. How many fathoms of hawser did you have out with her?

A. About a hundred fathoms—from ninety to a hundred.

Q. Who was the officer on deck from the time you left Port Townsend down to the time of the collision?

A. The mate Mr. Olson.

Q. Were you at the wheel during that time?

A. Yes, sir.

Q. Did you see the lights of the "Lakme"?

A. Yes, sir.

(Testimony of Oscar Anderson.)

Q. When and where were you when you first saw the lights?

A. Well, we had just come around Point No Point, just a little after we came around Point No Point, I don't know how far it would be, probably a couple of miles or a mile.

Q. What lights did you observe when you first saw the "Lakme"?

A. Well, I saw the masthead light, and then I saw the red light first.

Q. Well, did you see any other lights from time to time?

A. Yes, sir, I saw the green light and when she got closer—as soon as she changed her course a little she showed her green light on her starboard bow.

Q. Did your tug give any whistles?

A. Yes, sir.

Q. What? A. Two whistles.

Q. What was the position of the "Lakme" at that time?

A. She was a little on the starboard bow and she was showing her green light.

Q. Did she make any answers to the two whistles?

A. She answered with two whistles.

Q. Did the mate give any order after you received the signal from the "Lakme"? A. Yes.

Q. What?

A. He told me to go to starboard.

Q. Did you?

(Testimony of Oscar Anderson.)

.A Yes, sir, I did, I put her to starboard.

Q. What happened after that?

A. Our boat swung around to port and the "Lakme" seemed to head right for us and the ship turned right forward towards the light—she was still on our starboard bow about two points.

Q. Did the mate give you any further order?

A. When he got in closer he told me to hard-to-starboard.

Q. Did you hear the mate about that time when the "Lakme" got closer, say anything to the "Lakme"?

A. Yes.

Q. What did you hear him say?

A. Well, he said, "What is the matter with you?" he said, "Why don't you starboard your helm?" or something like that.

Q. About how far off was the "Lakme" at that time?

A. I guess probably three hundred feet or four hundred feet ahead of us—that is, on the starboard bow.

Q. On your starboard bow?

A. On our starboard bow.

Q. How did she proceed from that time on?

A. Well, she starboarded her helm a little until she got abreast of us, and that was the last I saw of her.

Q. After she got abreast of you you could not see her?

A. No, sir.

Q. Did you keep on your course? A. Yes.

Q. How far off was she—I mean how far or what distance was there between your boats up to the time she

(Testimony of Oscar Anderson.)

got abreast of you when you last saw her, how near was she?

A. She was pretty near; I don't think she could have been over one hundred and fifty feet away.

Q. You could not observe her after she got abeam of you?

A. No, sir, I could not see her after she got abreast of us.

Q. And you did not look back at all and did not observe the collision behind?

A. No, sir, I just heard the crash, that was all.

Q. Do you remember Captain Bailey coming up out of his room? A. Yes.

Q. Out of the pilot-house?

A. He came out of the room at the time when Mr. Olson shouted out to the "Lakme," that brought the captain out of the pilot-house.

Q. What course were you steering up to the time when the whistles were sounded, after rounding Point No Point?

A. I think we were steering something about south-southeast.

Q. How would that take you with reference to the shore on the westward?

A. Well, we were heading up along the shore.

Q. Pretty near parallel with that shore?

A. Yes, sir.

Q. About how far off shore were you?

A. Probably three-quarters of a mile or a mile.

(Testimony of Oscar Anderson.)

Q. How was the tide, did you observe that?

A. No, sir, I don't know anything about the tide?

Cross-Examination.

Q. (Mr. GRIGGS.) What kind of a point is Point No Point, is it high or low?

A. It is a low point, with a lighthouse on it.

Q. Did you notice the "Lakme's" lights at any time before you got around the point?

A. No, sir, I don't think I did.

Q. It was not until after you had passed it?

A. Not until after we passed it.

Q. About a mile or so?

A. Yes, sir, about a mile.

Q. And at that time how far away did the "Lakme" seem to be from you?

A. Probably three or four miles—three miles anyway.

Q. At that time you could see her red light?

A. I saw her red light at that time.

Q. How long did she keep her red light in view, do you remember?

A. Two or three minutes.

Q. When did you see the green light first?

A. When she altered her course; that was the time when Mr. Olson blowed the whistle; I guess it must have been about probably two or three minutes before she got into the collision.

Q. Did you see her green light at any time before the whistles were blown? A. I did.

(Testimony of Oscar Anderson.)

Q. How long before?

A. Well, it was probably a minute or a couple of minutes.

Q. Then you think the "Lakme" had changed her course before the whistles were blown?

A. Yes.

Q. About how much of a change would that make in her course, if any?

A. I don't know how much of a change it would make; when she showed her green light that way she must have changed at least two points.

Q. At that time she was about the same distance out from the shore that you were? A. Yes, sir.

Q. Did you notice particularly about the other shore; the eastern shore, how far away that was from you?

A. It was a long ways off; I don't know.

Q. Was there anybody else in the pilot-house except you and Mr. Olson? A. No, sir.

Q. At any time after you left Port Townsend?

A. No, sir.

Q. Was Captain Bailey below all the time until he came out after the call? A. Yes, sir.

Q. Mr. Olson and you, both of you, stayed in the pilot-house all the time? A. Yes, sir.

Q. Did you see the assistant engineer, Mr. Flint, at any time? A. No, sir, I don't remember.

Q. Did you hear him say anything?

A. No, sir.

(Testimony of Oscar Anderson.)

Q. When Mr. Olson yelled to the "Lakme" to starboard her helm, did she seem to follow that direction then, did she seem to change her course?

A. She seemed to turn a little, but it was pretty close at that time.

Q. Just before he called she was swinging the other way?

A. Well, she seemed to come right straight for us.

Q. Right for you?

A. I think so; yes, that is on an angle like.

Q. Now, the first change in your course was from starboard to hard-to-starboard; is that right?

A. Yes, sir.

Q. How long did you continue on starboard before you got the order "Hard-to-starboard"?

A. Three or four minutes, three or four minutes probably.

Q. You did not notice how the tide was running, did you? A. No, sir.

Q. Did you see anybody on the "Lakme" at the time Mr. Olson yelled out? A. No, sir.

Q. Did you see anybody on the "Lakme" at any time? A. No, sir.

Q. Do you remember about what time it was that the collision occurred?

A. It was after three o'clock sometime.

Q. What did your boat do after the collision?

A. Well, the captain sung out to the ship to keep on

(Testimony of Oscar Anderson.)

with starboard helm, and then we went on alongside the "Lakme" and the captain asked the "Lakme" if she was leaking or anything, and wanted any assistance and he said no.

Q. Did you notice where your boat was then with reference to Point No Point light?

A. No, sir, I did not take any notice of the vessel.

Q. Did you notice where you were at that time with reference to Point No Point shore, or the shore on the other side, the west or east?

A. No, sir, I did not take any notice after the collision was over, I did not take any notice of the ship at all.

Q. You picked up the "Queen Elizabeth"?

A. Yes.

Q. And went on to Port Blakely? A. Yes.

Q. Do you remember about how far out in the sound you picked up the "Queen Elizabeth"?

A. Well, she was out a little farther from the "Lakme" than at the time of the collision—she kept on her starboard helm.

Q. Did you see anybody else on the tug "Tyee" at the time of the collision?

A. No, sir, I don't think so, not that I know of, at least I didn't see any.

Q. Where are you employed now?

A. I am employed by the Puget Sound Tugboat Company.

Q. In what capacity? A. Quartermaster.

(Testimony of Oscar Anderson.)

Q. On one of the tugs?

A. On the "Tacoma."

Redirect Examination.

Q. (Mr. HUGHES.) How many men were there on watch at that time on the "Tyee"?

A. Well, there was me and the mate in the wheel-house and then, of course, the engineers and the chief engineers down and the firemen down below, but there was only me and Mr. Olson in the pilot-house at the time.

Q. But there are several other men on watch on deck, or usually on deck?

Mr. GRIGGS.—I object to the testimony for the reason that the witness states that there were no others on deck.

A. There would not be anybody on deck except the quartermaster and the mate at night.

Q. (Mr. HUGHES.) That is forward—but you don't know where the other men were aft, do you?

A. No, sir.

(Testimony of witness closed.)

H. HARKINS, called as a witness in behalf of intervenor, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. HUGHES.) Are you in the employ of the Puget Sound Tugboat Company? A. Yes, sir.

Q. What capacity?

A. Chief engineer of the "Tyee."

(Testimony of H. Harkins.)

Q. How long have you been chief engineer of the "Tyee"?

A. Ten years three months and two days exactly.

Q. You were on her on the night of the collision between the "Lakme" and the "Queen Elizabeth"?

A. I was, yes, sir.

Q. You picked up the "Queen Elizabeth" at Port Townsend?

A. We picked up the "Queen Elizabeth" at Port Townsend.

Q. And took her in tow for Port Blakeley?

A. Yes, sir.

Q. Were you on watch from Port Townsend down to the time of the collision? A. No, sir.

Q. Tell us what you know about this affair.

A. I know that I was called by my assistant, he said, "Come, get up—get up quick—she is heading right for your room," and so I swung out of bed and opened the door and I looked and said, "No, she won't strike us, but if she don't get out of his way that ship will run into her." And I passed through the engine-room and out aft to go to see the collision and after I got aft the ship ran into her.

Q. Just describe how near did the "Lakme" come to your tug.

A. She passed us about a hundred feet or a hundred and fifty feet, I should judge; about the length of the vessel.

(Testimony of H. Harkins.)

Q. Did she cross between you and the tow—in what direction was she bearing in reference to the tug and the tow?

A. When I saw her she was bearing almost directly on my room; that would be just about amidships of the "Tyee."

Q. When you first saw her?

A. When I first saw her; yes, sir.

Q. How did she change after that?

A. She passed by us or we passed by her, and as I passed out aft she was astern of us, and right directly the ship ran into her.

Q. That course would take her between your tow and the tug, would it? A. Very nearly.

Q. Did she pick up your tow-line?

A. I believe she did; the tow-line parted directly when she struck the ship and I saw the tow-line parted.

Q. And when the collision occurred almost instantly afterwards? A. Yes, sir.

Q. How did she collide?

A. Well, the ship struck the "Lakme"—the ship's port bow struck the "Lakme" on the port bow.

Q. And made a glancing collision?

A. Well, almost bow on very nearly, and then the "Lakme" slid on and passed by the side of the ship, and after she struck her then I saw something loose coming down from above when she struck the "Lakme's" deck, and it was one of the yards.

Q. One of her lights came down?

(Testimony of H. Harkins.)

A. I did not notice that.

Q. But the yard came down?

A. Yes, sir, I heard it distinctly when it struck the deck—I know something came down from aloft because I heard it strike the deck and I thought there would be a lot of people crippled up—I did not see how they could avoid it.

Q. What became of the "Lakme"?

A. She passed by the vessel—she went by and Captain Bailey spoke to her.

Q. Did she keep right on.

A. No, sir, she hove to for a while.

Q. How far did she go before she stopped?

A. We were in motion and they were in motion, but we swung around and spoke to the "Lakme," but in the position of the "Lakme" I did not notice—I was in my night-clothes and I did not stay on deck any more than I could avoid it, but I went back into my room.

Q. After your tug took the ship in tow?

A. Yes. I turned directly in as soon as they said they were not leaking and that they were all right.

Q. What kind of a night was it?

A. A clear night—moonlight.

Cross-Examination.

Q. (Mr. GRIGGS.) Did you notice whether or not there was anybody on board the "Lakme"?

A. I did not see any—there was such a turmoil; there was no reply and I did not hear any voices.

(Testimony of H. Harkins.)

Q. Did you hear the captain of the "Lakme" speak to Captain Bailey of the tug?

A. After we had gone back; that was afterward.

Q. But not as they passed? A. No, sir.

Q. Did you notice how far out you were towards the middle of the sound?

A. Well, no, I noticed as I went aft I could see Point No Point light; that is, the ship was to the left, that would be above the light.

Q. Did you notice how far out towards the middle of the sound you were? A. I did not notice.

Q. What is your impression

A. I did not form any impression at all.

Q. How far away from Point No Point light were you?

A. I could not say.

Q. Have you any idea about it?

A. No, sir, I could not say anything about it; I was particularly interested in the collision and I supposed there was a lot of people injured or maimed—they were certainly working up for it.

Q. You had no way of forming any idea of how far out you were?

A. No, sir, I could not say at all; it was none of my business.

(Testimony of witness closed.)

OLAF JOHNSON, called as a witness in behalf of Intervenor, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. HUGHES.) How old are you?

A. Thirty-seven.

Q. What is your business. A. Going to sea.

Q. How long have you been going to sea?

A. Since I was fourteen years old.

Q. What positions have you held?

A. Well, I have been going as sailor, and this last ten years I have been sailing as mate and second mate and master of sailing vessels.

Q. The last ten years mostly mate and second mate?

A. Yes.

Q. On steam vessels?

A. Mostly sailing vessels, but some steamers.

Q. You have been on some steamers as mate?

A. Yes.

Q. Were you mate of the "Lakme" in April last?

A. I was.

Q. Were you on board the "Lakme" at the time of the collision? A. I was.

Q. From what port did the "Lakme" depart?

A. Tacoma.

Q. Bound for where?

A. Bound for San Francisco.

Q. When did she leave Tacoma?

A. In the evening of the 13th of April; sometime I could not exactly tell the time she left.

Q. Were you on watch when she left?

(Testimony of Olaf Johnson.)

A. I was on watch until twelve o'clock.

Q. Where was she when your watch ended?

A. A little south of Alki Point when the second officer took charge of the bridge.

Q. Who was the second officer who took charge of the boat?

A. His name is—I can't think of his name now—something like Gilfoil or Gilboy. So then he came on the bridge and I called the captain and the captain told me to tell the second mate to call him when he comes down to West Point light, if he saw any vessel's lights or steamers coming along to call him also.

Q. And did you go and tell the second mate that?

A. I went and told the second mate—I went back and told him.

Q. And what did he say?

A. He said he would come and call him when he came to West Point light. You can see the West Point light plain when I left the bridge, I pointed it out and told him that was the West Point light.

Q. You retired, did you? A. I went to bed.

Q. What was the next thing that attracted your attention?

A. When the whistles were blown from the "Lakme."

Q. Were you awake when the two whistles were blown from the tug?

A. No, sir, I was not awake then.

Q. Did you hear the two whistles from your boat?

(Testimony of Olaf Johnson.)

A. I just heard them in my sleep like, the two whistles, the same as they blew for passing vessels.

Q. Did you get up then?

A. No, sir, I did not get up then, I did not pay any attention.

Q. What was the next thing?

A. The next thing was something struck the "Lakme" forward, and I thought it was something struck the rigging.

Q. What did you do?

A. I jumped out of the bunk and put my clothes on.

Q. What did you find?

A. When I came up on deck there was a big ship right alongside of us, and so I went back again until the ship passed, and after she passed I went out on deck and sounded the pumps to see if there was any water and I did not find any.

Q. Did you go up on deck before you were fully dressed?

A. No, sir, I was fully dressed before I went on deck.

Q. What did you do after that?

A. And then I went up on deck and it was all over then and the ship was passed, and then we got the hawser on the bow, and so we all went forward to see what damage we got, and then after that we proceeded towards Point No Point until daylight, and after it got daylight she found she was so much damaged she had to return again for repairs.

Q. Did you go back again to Seattle?

(Testimony of Olaf Johnson.)

A. Yes, sir.

Q. Did you notice any of your lights had come down?

A. Yes, sir, the masthead light was carried away and the port light was gone.

Q. Was the starboard light left there?

A. The starboard light was left.

Q. Did you call the captain's attention to the starboard light? A. To the light screen, I did afterward.

Q. When? A. After we turned back to Seattle.

Q. You may describe those lights—the side screens, how they were placed.

A. They were just two boards lashed around the rigging; the screens were three feet forward of the light, but they were not parallel to the ship's keel; just seized on the rigging.

Q. So that the ship's screens would not stand parallel with the ship's keel? A. No, sir.

Q. How did they stand?

A. They stood just in the rigging, just the way the rigging was.

Q. That would make them point towards each other, the two screens? A. Just like this. (Showing)

Q. That is, point in the same direction, a common angle, making the two sides of an angle?

A. The after-shield was farther out than the forward; the after-strew of the vessel is always farther out than the forward.

Q. Would that permit the lights to cross the bow?

(Testimony of Olaf Johnson.)

A. They must be seen across the bow when the light is that way.

Q. So that the green light could be seen on the port bow, across the port bow, and the port or red light across the starboard bow?

A. Whether they showed across the bow or not I cannot say.

Q. The screens would not prevent their showing across the bow if they were hung that way?

A. They would not.

Q. Was that the way that the screen of the port light was before it came down? A. Yes, sir.

Q. Had it been that way before you came down on her? A. Before I came on board her.

Q. How long had you been on board?

A. I had been aboard her something like four months.

Q. What did the captain say when you called his attention to the position of the screen?

A. When I told him about the light screens the captain told me to cut the starboard screen down before I got into Seattle.

Q. Did you do it?

A. I did, and then while we were going to Seattle I was talking to the second mate.

Q. Go on and state what conversation you had with the second mate.

A. Well, I asked him how the collision happened, etc., and so he told me—he said he only made one mistake

(Testimony of Olaf Johnson.)

and that was he ported his wheel, he said, and he didn't blow any whistles.

Q. Ported his wheel? A. Before the accident.

Q. Without blowing any whistle?

A. Before the steamer blowed her whistle and he did not blow any whistle and put his wheel hard-aport, but he didn't blow any whistles, and also when I came up in the pilot-house in the morning I looked in the pilot's log-book and when he passed West Point light he put down Point Wilson in place of West Point light. I called his attention to it and rubbed it out and put down West Point light.

Q. Had this second mate any mate's papers?

A. No, sir, he had no mate's papers—that was what I was told, and the captain told me he had got a permit from the inspector Ryan of San Francisco to take him as second mate.

Q. When did he come on board your ship?

A. He came on board in Seattle; I don't remember just what time, just before we went to Tacoma.

Q. On this same trip? A. On this same trip.

Q. How long had he been on board up to the time this collision occurred?

A. Up to the time the collision occurred he had been aboard, I should judge six or seven days, or eight days probably.

Q. After you got to Seattle did you examine the bow of your ship? A. Yes, sir.

Q. Did you find the hawser there? A. Yes, sir.

(Testimony of Olaf Johnson.)

Q. Describe how you found it?

A. I found the hawser on the stem.

Q. How was it? Describe its position.

A. It was caught in the stem, about four inches, as near as I could judge; the wire thimble of the hawser, that is connected with the rope hawser was right in the stem there.

Q. But the hawser had cut into your stem there, right at the thimble? A. Right at the thimble, yes, sir.

Q. It was the thimble of the hawser that cut into your stem? A. Yes, sir.

Q. And was hanging fast there?

A. Yes, sir.

Q. How much manilla rope hawser was fast to it?

A. Well, I should judge as far as I know—of course we strung the manilla hawser out coming to Seattle, and we were afraid it was going to get into our wheel—she was about one hundred thirty or one hundred and forty feet or somewhere along there.

Q. And you had the wire end of the hawser also?

A. On the other side, yes, sir.

Q. And you had that in your ship? A. Yes, sir.

Q. Now did the captain give you any orders in regard to this? A. He gave no orders until we went ashore.

Q. Did he afterwards give you any orders?

A. The hawser was on the stem for two hours after we came to Seattle, and then when the captain came back he told me to chuck the hawser overboard.

Q. What did you do?

(Testimony of Olaf Johnson.)

A. I hove it out of the stem and let it go forward overboard.

Cross-Examination.

Q. (Mr. GRIGGS.) Where did you leave the "Lakme"?

A. I left the "Lakme" at Seattle last year, sometime, I forget exactly.

Q. Was that when the boat returned here after the collision?

A. After we had been up to Cape Nome one trip,

Q. Did you have the same captain on that trip?

A. Yes, sir.

Q. Did you have any trouble with the captain?

A. No.

Q. Left of your own accord? A. Yes, sir.

Q. Where are you employed now?

A. I am not employed anywhere.

Q. What have you been doing?

A. I have been down in San Francisco this last seven months. After that the tugboat company engaged me as a witness in this suit, and then I went down to San Francisco.

Q. When were you engaged as a witness in this suit?

A. It was the time I left the "Lakme" last year, last summer.

Q. Who engaged you, who was it?

A. Captain Libby.

Q. And you went down to San Francisco for what?

A. Because I had my family living down there and I

(Testimony of Olaf Johnson.)

did not want to stay up here, and so I went down there until the suit came up.

Q. How did he engage you—what did he do?

A. Well, he paid me so much a month until the case comes up—otherwise I would have to go to sea and go away.

Q. What did he pay you?

A. He paid me a hundred dollars a month.

Q. How much?

A. A hundred dollars.

Q. You say you noticed both the port and starboard lights had been rigged in this way so that their screens were not parallel to the keel? A. Yes, sir.

Q. When did you notice that?

A. I noticed it the first time I went aboard the ship.

Q. Did you say anything to anybody about it?

A. I told the captain several times about the lights.

Q. What did he say?

A. Well, he didn't give any particular answer to it.

Q. Have you any idea what angle they made with the keel of the ship?

A. No, I have not any idea now how much it would be. The screens wer lashed along with the rigging—the light screens were lashed the same as the rigging was.

Q. Can you remember anything the captain said when you told him about this? A. No.

Q. How many times did you tell him—have you any idea?

A. I may have spoke to him about the light screens

(Testimony of Olaf Johnson.)

some time when he was on the bridge and so forth, but I don't, I don't know what he said.

Q. But you did speak to him about it several times?

A. Yes.

Q. When did you go on the "Lakme"?

A. I went on her somewheres about three or four months before the collision.

Q. And you noticed it immediately?

A. Yes, sir.

Q. But you made one trip on the "Lakme" before the collision?

A. I had made more than that. We had made two trips to Alaska before and we made two trips up from Tacoma to 'Frisco before, as near as I can remember.

Q. When did you have this conversation with Gilfoil about the collision—was that before or after?

A. That was just after we returned to Seattle, just about breakfast-time, or somewhere along there.

Q. What did he tell you about the collision—can you remember just what he said?

A. He told me he only made one error, he said, and that was he put his wheel hard-to-port and he did not blow any whistle, and that was the only mistake he made.

Q. He told you that he put his wheel hard-to-port and did not blow his whistle?

A. He said he put it hard-to-port, but he didn't blow any whistle.

Q. Did he say anything more about the collision than that?

(Testimony of Olaf Johnson.)

A. No, sir, he didn't say anything. He said he could have seen the steamer's light—he could have seen the port light all the time before he came up.

Q. Was that all he said?

A. That was all he said.

Q. Didn't he say that from the direction of the steamer's light and her apparent course he was going to pass to the right of her, that was the reason he ported?

A. He said he thought he would get more room—that was the reason he ported his wheel to get more room, and after he ported his wheel he said the steamer blowed two whistles and he answered.

Q. Then you did not hear the tug's whistles at all?

A. No, sir.

Q. Did you notice how far you were out in the sound when you came up on deck?

A. When I got up on deck I should judge—I don't remember exactly—I should judge somewhere about a mile anyway.

Q. A mile from the shore?

A. A mile from the shore—we were over on that shore.

Q. Do you know how far south you were of Point No Point?

A. We were right between Point No Point and that bay there.

Q. Appletree Cove? A. Appletree Cove.

Q. About how far would that be from Point no Point?

A. I should judge two or three miles; I don't know exactly how far it was.

(Testimony of Olaf Johnson.)

Q. You did not come up on deck until after she struck?

A. No, sir.

Q. But you remained awake from the time you heard the two whistles blow?

A. When I heard the two whistles it was just like in my sleep and I went off again, but then I fancy it was no time after the whistles blew until she struck; how long it was I could not say exactly.

Q. Were you talking with Gilfoil about this collision except that one time?

A. We used to talk over it lots of times afterwards but that was all he said about it?

Q. Didn't he ever say that he thought the tug was at fault in attempting to cross his bow?

A. He said it was the tug's fault; that was what he told me.

Q. What did he tell you about that?

A. He said he could see his port light all the time he said, and he had no business to give two whistles.

Q. Didn't he say that the collision would not have occurred if he had not attempted to cross his bow?

A. Yes, he said that was what he said and it was because he crossed his port bow—he said all that the time—if he hadn't crossed his port bow the collision wouldn't occur.

Redirect Examination.

Q. (Mr. HUGHES.) Did he say why he gave two whistles for an answer?

(Testimony of Olaf Johnson.)

A. When the tug blowed two whistles he answered two whistles.

Q. Did he tell you why he answered two whistles if he wanted her to stay on the port side?

A. He didn't say why he answered two whistles.

Q. He claimed he only made one mistake himself, in his statements to you?

A. Yes, sir, that the only mistake he made was to put his wheel hard-aport and he didn't blow no whistles.

Q. Would it be proper for a man to change his course before he gives a signal to an approaching vessel?

A. No, sir, it would not.

Q. He should give the signal before he changes his course? A. Yes.

Q. And wait until he got an answer before he changed his course? A. Yes.

Q. And when the tug gave two whistles, if he was then on the port helm, what should he have done?

A. He should have stopped his vessel and gone full speed astern.

Q. Should he have answered with two whistles?

A. No, sir, he should blow several short blasts to indidicate that he was going full speed astern.

Q. If the tug gave two whistles and he answered with two whistles, what should he have done?

A. Put his wheel hard to starboard.

Q. Should he have answered with two whistles unless the distance was sufficient to enable him to clear by going to port?

(Testimony of Olaf Johnson.)

A. No, sir, and putting his wheel hard-to-starboard.

Q. Not unless he knows he would be able to clear it.

A. Unless the distance was sufficient to easily clear it.

Q. If the "Lakme" and the tug were a mile apart and nearly end on, would there be any difficulty whatever in clearing, even if he had been under a port helm the moment before the whistles were given and answered?

A. No, sir, he would not.

Q. Even if they had been half a mile apart, there would have been ample time to easily clear each other, ib both ships had taken the starboard helm and kept off?

A. I think so; if he should put his wheel hard-to-starboard, I don't see why he could not clear.

Q. With reference to the starboard screen which you say the captain told you to cut down and throw overboard; had it been injured by the collision?

A. No, sir.

Q. Was it in the same condition when you cut it down as it was when you left the port of Tacoma?

A. The same condition exactly.

Recross-Examination.

Q. (Mr. GRIGGS.) You cut it down and threw it overboard?

A. I did not throw it overboard; I cut it down and put it amongst the lumber down forward—I did not throw it overboard.

Q. Was there any other light put in its place.

A. After I left Seattle for Tacoma there was.

(Testimony of Olaf Johnson.)

Q. Now you have a license as a mate?

A. As a master.

Q. You have a license as a master?

A. As a master.

Q. And where have you acted as master, in what waters?

A. The waters of the Pacific coast—the waters of San Francisco.

Q. All along the coast? A. The Pacific coast.

Q. And the same rules govern navigation of ships in Puget sound waters as all along the coast?

A. Yes, sir.

Q. Now, do you consider it the position that is described as end on, or nearly so, when both ships can see the red lights and not the green lights—when both approaching ships can see the red lights only?

A. When we see the red—

Q. I say when both ships, approaching ships can only see the red lights, do you consider that position as end on or nearly so?

A. Then you port your wheel and blow one blast of your whistle and go to the right.

Q. I say when ships meet in that position, so that you can see the red light of the other approaching steamer, so that you know that you are not meeting in the position that is described as end on or nearly so, do you consider it necessary to whistle before you port your wheel?

A. Yes, sir, I do.

(Testimony of Olaf Johnson.)

Q. You always blow your whistle before you port your wheel?

A. I blow the whistle and do not port the wheel before I get the answer from the steamer.

Q. Supposing that the "Lakme" in this case could see the light of the tug, and the tug the red light of the "Lakme," and they were approaching in that direction, so that each could see the red light of the other—

A. Yes, sir.

Q. Which was the proper course for the two boats to take?

A. To take to the right—to port the wheel and blow one blast of the whistle—port the wheel and go to the right.

Q. Approaching in that position and in the direction the two vessels would not be considered in a dangerous position at all, would they? A. No, sir.

Q. They would pass safely to the right?

A. They would pass safely to the right.

Q. Now, suppose that as they passed each other and as they were within a short distance, the tug had suddenly changed her course, at the same time she blew two whistles, so that she swung across the course of the "Lakme," then what should the "Lakme" have done?

A. If the "Lakme" did not think that she could clear at all, then she should have stopped the ship—if she could not clear and go full speed astern.

Q. The tug was towing a ship at the time?

A. Yes, sir.

(Testimony of Olaf Johnson.)

Q. You have managed steamers with ships in tow, have you?

A. I have been on a tugboat up the sound here, out of Ballard.

Q. Do you know as a matter of experience, whether a tow of such a kind as the ship "Queen Elizabeth" was, would turn as quickly as the tug "Tyee"?

A. The general rule is the ship always follows the tug.

Q. Would she swing as quickly on her helm as the tug?

A. It might take a little more time before she swung as quick as the tug.

Q. You were not on the "Lakme" long enough to know whether she responded quickly or slowly to her helm?

A. She always acted slow.

Q. Do you know whether the tug "Tyee" responded slowly or quickly to her helm? A. I don't know.

Q. Do you know about tugboats generally, whether they act quickly or slowly?

A. Generally, small boats that I have been on generally act quick—the only tug I was on was the "Mount Ranier," at Ballard.

Redirect Examination.

Q. (Mr. HUGHES.) Mr. Johnson, the officer on watch on the "Lakme" could tell that the tug had a tow by the two lights suspended from the masthead, could he not? A. Yes, sir.

Q. Now, a tug having a tow could not stop and reverse, could she? A. No, sir, she could not.

(Testimony of Olaf Johnson.)

Q. So the officer in charge of the "Lakme" in an emergency, would have to take that into consideration, wouldn't he? A. Yes, sir.

Q. And you say that they were about three-quarters of a mile to a mile off shore?

A. Somewhere about a mile, so far as I could judge, when I got on deck; they may have been closer in or farther out, I could not tell.

Q. A tug with a light ship in tow could not pass as near in shore as the "Lakme," could she?

A. No.

Q. It would not be prudent to pass as near as the "Lakme" in shore?

A. It would not be safe on account that she had a tow behind.

Q. Is it not true that you could see the red light with the naked eye very much quicker than you can see the green light? A. Yes, sir, you generally do.

Q. And the fact that you could see a red light on the ship ahead of you, would not make you conclude at once that she was not nearly end on, would it?

A. No, sir.

Q. You could tell from the masthead lights when you saw them plainly whether she was about end on, without reference to the sidelights?

Q. Well, if I see a steamer, I generally wait until I can see her lights and see which way she comes. I have to see her two sidelights if she is end on, and when I see her two sidelights I know what to do.

(Testimony of Olaf Johnson.)

Recross-Examination.

Q. (Mr. GRIGGS.) If you were looking ahead and can see the red light of an approaching steamer about two degrees to port, then have you any doubt as to whether the boats are passing, or would pass properly to the right of each other in safety?

A. If I can see her red light then I know she will pass all right.

Q. If you see the red light two degrees to port you know she will pass you to the port safely, don't you?

A. Yes, sir, I do. In case where we are coming a little too close I will blow one whistle from the steamer.

Q. If you see a tug approaching you with a tow, is it not a fact that you can be positively certain that in the absence of some reason or some danger for it, that she will keep her course absolutely and she won't change her course? A. Yes, sir.

Q. And so you then rely upon her keeping a straight course, is not that correct?

A. That is the fact, yes, sir; I generally keep out of the way of tugs when I have charge of steamers.

Q. You know that the tug with her tow is sure and certain to keep her straight course; she is not going to attempt to cross your course.

A. No, sir, she is not.

Q. That would be very bad seamanship, would it not?

A. Yes sir, but when I have charge of a bridge I always keep clear of a tow.

(Testimony of Olaf Johnson.)

Q. Now, suppose the "Lakme," in this case when the "Tyee" blew her whistles, saw that the "Tyee" had changed her course so that she was crossing her bow, and suppose they were so close at that time that she could see that if she attempted to back and reverse or stop her engines or reverse and back, that she would be left directly in front of the big ship "Queen" when she swung around on a little different angle so that she would be struck amidships; would you then say it was good seamanship on the part of the "Lakme" to stop her engine and back; or would it not be proper to do just as she did—that is, to change her course so as to strike a glancing blow instead of being struck amidships?

A. I don't know. The "Lakme" knows that the steamer can't stop under any consideration she is bound to—if she blew two whistles and she was answered by two whistles, she was bound to put the wheel to starboard —she could not do anything else.

Q. That is the "Lakme"? A. The tug.

Q. I say, supposing that the tug changed her course immediately she whistled, and the "Lakme" then found her crossing her bow— A. Yes.

Q. Because the tug can change a good deal quicker than an ordinary steamship? A. Yes.

Q. Now, then, supposing she also sees that the "Queen Elizabeth" is coming up on a different angle and does not turn as quickly? A. No.

Q. And the boats are so close that the "Lakme" can see that if she attempts to stop or reverse or back, that

(Testimony of Olaf Johnson.)

she will be struck amidships by the ship, which is swinging up under the tow of the tug, now would it not be good seamanship, under those circumstances, to proceed and change her course so as to strike a glancing blow instead of being struck head on or amidships?

A. No, sir.

Q. You think not? A. No, sir.

Q. You think she should have attempted to reverse?

A. Yes.

Q. (Mr. HUGHES.) In other words, if she was far enough off so that when she got two whistles and she answered with two whistles and then discovered that there was danger of a collision, it would be bad seamanship to do anything but reverse on the part of the "Lakme"? A. Yes.

Q. Knowing that the tug could not stop and reverse?

A. No, sir, she could not.

(Testimony of witness closed.)

CHARLES T. BAILEY, produced as a witness in behalf of intervenor, being first duly cautioned and sworn, testifies as follows

Q. (Mr. HUGHES.) You are master of the tug "Tyee"? A. I was at the time of the collision.

Q. You have been master of different tugboats for the Puget Sound Tugboat Company for how many years?

A. Fifteen years.

Q. Now, you have what tug?

(Testimony of Charles T. Bailey.)

A. The tug "Tatoosh," the new tugboat built here by Morans.

Q. You were master of the tug "Tyee" in April last?

A. I was.

Q. What time of night was it that you took the "Queen Elizabeth" in tow?

A. We went alongside of the "Queen Elizabeth" about a quarter past twelve in Port Townsend; I should judge from the time that he got his anchor hove up and out of the water until the boat was hooked on it was probably an hour; she was hooked on at a quarter past one, bound from Port Townsend to Port Blakeley—it would take him an hour to get his anchor out of the water.

Q. Who was on watch at the time you left Port Townsend and up to the time of the collision?

A. I was on watch at the time we left the wharf until we rounded Marrowstone Point, about half way up to Point ————, and then, my pilot, Harry Olson, took charge.

Q. The gentleman who gave testimony here this morning? A. Yes, sir.

Q. What did you do? A. I turned in.

Q. Where is your cabin?

A. My room is on the top house, connected with the pilot-house by a door—the doors open right from one room to the other.

Q. How high is the pilot-house?

A. The top of the pilot-house is about fourteen feet

(Testimony of Charles T. Bailey.)

above the deck. The top of the pilot-house is about eighteen feet—the top of my room is about fourteen feet.

Q. What lights has the pilot-house?

A. The pilot-house has two sidelights—a green and red light.

Q. I mean the pilot-house—what windows has it?

A. It is glass all around it so that you can see all round.

Q. And these are above the top of your cabin?

A. You stand in the pilot-house and the window commences at your waist and reaches up about eight or ten inches above your head.

Q. That is all around? A. Yes, sir.

Q. Your cabin did not cut off the light?

A. No, sir, it don't cut it off at all; you can see forward and aft and all around the horizon from the pilot-house floor.

Q. What lights did your tug carry?

A. She carried the green and red light and two masthead lights and a steering light; all lit by electricity —and electric lights at that time was the best lights on any vessel on the sound.

Q. The stern light was for the benefit of the tow?

A. For the benefit of the tow.

Q. And the tow follows your stern light?

A. The tow follows our stern light.

Q. What are the two masthead lights for?

A. They are to inform people—passenger steamers that I have a tow. If I have got one ship I carry two

(Testimony of Charles T. Bailey.)

masthead lights and if I have got two ships I carry three masthead lights.

Q. That is the rule in towing?

A. That is the rule in towing so that any passenger steamer passing me can tell whether I have one vessel or two.

Q. And if you don't have a vessel in tow?

A. Then I only carry one masthead light, the same as any other steamer.

Q. What kind of a ship was the "Queen Elizabeth"?

A. The "Queen Elizabeth" was an iron ship, a full-rigged ship in ballast probably drawing about fourteen or fifteen feet of water, and I think of about 2,000 tons burden—between 1,800 and 2,000 tons.

Q. You had gone to sleep had you, after turning in?

A. Yes, sir, I had gone to sleep.

Q. When was your attention first called?

A. My attention was first called by the mate blowing two whistles.

Q. You heard that?

A. I heard that and then I heard the steamer answer with two whistles I found out the signal was answered correctly and I dropped off into sleep again and I don't know how long I was sleeping. A man gets accustomed so that the whistles blowing wakes him up or the stopping of the engine will wake him up if he is not too sound asleep; anyone that is accustomed to steamboating knows that. I heard the mate sing out, "Are you all crazy? why don't you starboard your wheel"? and I jumped out in my

(Testimony of Charles T. Bailey.)

night-clothes and I rushed into the pilot-house and he said, "Captain, that fellow is coming down on us, and I blew two whistles to him and he answered me with two whistles and he throwed his wheel hard-to-port," and I said to him, "Quartermaster how is the wheel." and he said, "Hard-to-starboard," and I said to him, "Keep it hard-to-starboard," and just as I talked to him I thought that the "Lakme" was going to come into us, but after looking at her for probably a minute, I found out she was going to clear the tug and I told the mate to go down on deck and he went down on deck, and the "Lakme" passed across our stern probably, I should say, it might be two hundred feet, or it might be three hundred feet; it is pretty hard to judge, but I would say three hundred feet; and she picked up the bight of our hawser —the hawser ran along on the stem until she came to the wire and when it came to the wire the wire coming so much harder than the stem that it parted right there, and at the time of the collision it might have parted ten or twenty seconds before the collision.

Q. From your stern?

A. The manilla parted about two-thirds of the way from the tug to the ship.

Q. How did the "Lakme" and the "Queen Elizabeth" collide?

A. They come together; it was very near an end on collision, but a glancing blow on the port bow; the port bow of the "Lakme" struck the port bow of the "Elizabeth." After they had struck, probably ten seconds after

(Testimony of Charles T. Bailey.)

that, after they had struck, I heard a crash which I afterwards found was the yard of the "Lakme" coming down from aloft; she crashed the squairsail yard on the foremast. I still had my wheel hard-to-starboard; I did not change my wheel and I sung out to the ship to steady himself—to steady his wheel and let her head down the sound, and I went down and spoke to the "Lakme" and asked him if there was anything leaking—if he needed any assistance, and he said no; so I went back and picked up the ship and took her to Blakeley, and came over to Seattle and reported the collision to Captain Libby, I think it was about—I don't know exactly what time—it might have been nine o'clock or it might have been eight o'clock—between eight and ten o'clock I first observed the "Lakme" lying down at the Arlington Dock.

Q. It might have been eight or nine o'clock when you reported to Captain Libby?

A. Yes, sir; I stayed at Blakeley some little time, and went on board the ship and ascertained if there was any damage done to her.

Q. Did you afterwards, here at Seattle, go down about ten o'clock to the "Lakme"?

A. I went at about two o'clock in the afternoon to get my hawser; she was lying at the wharf and the wire was still caught in her stem, and she had the manilla part tangled up on her starboard side.

(Testimony of Charles T. Bailey.)

Q. When was that?

A. That was all the forenoon; I went to the coal wharf first.

Q. But you had seen the hawser there?

A. I had seen it when we were close down alongside her; Captain Libby and I, in the forenoon, we saw the hawser. I got coal and at one o'clock I went down and ascertained that they threw the hawser overboard; then I went back and got a grappling hook, and by this time the "Lakme" had moved out, and when the "Lakme" had moved out and I came down with the grappling irons, I grappled and I caught the hawser; it seemed that they had cut the wire or the thimble off and had throwed it overboard, right over the end of the Arlington dock; and I asked them why they did not wait until I or Captain Libby came down, and they said they didn't want the damned thing hanging on there; that it didn't look shipshape. I don't know who answered me, whether it was the second mate or the quartermaster or who it was.

Q. Now, captain, about how far were you below Point No Point when this collision occurred?

A. Above Point No Point you mean?

Q. Above Point No Point.

A. At 3:31 we had Point No Point light beam; this collision occurred, as near as I could tell, about ten minutes to four by our time; there may be some difference in their times; that would put us two miles probably, two miles above Point No Point, or about two-thirds of the

(Testimony of Charles T. Bailey.)

way between Point No Point and Pilot Point; nearer Pilot Point than Point No Point.

Q. How far off shore?

A. Not to exceed a mile anyway, about three-quarters of a mile.

Q. What was your course after leaving Point No Point and prior to the collision?

A. We were steering from Point No Point—

Mr. GRIGGS.—We object to the testimony, for the reason that the witness was in bed at the time and cannot possibly be able to testify.

A. I know what the boat's course was, because it is marked, every point she passes, and the time. I could show the log and look at it for ten years and you can't find a course to vary a half a point in it—we steered from point to point.

Q. What would that course be?

A. That course is south-southeast by the pilot-house compass. South-southeast, three-quarters south magnetic. The pilot-house compass is a quarter of a point difference on that course.

Q. Have you got the Puget Sound naval chart here?

A. Yes, sir. (Producing chart.)

Q. I wish you would project the course from Point No Point, which you say is the regular course, to Appletree Cove, and which you have given as being the same course which the mate in this case says he steered.

A. What is the mate's testimony—how far was he off Point No Point? Southeast three-quarters south mag-

(Testimony of Charles T. Bailey.)

netic—he steered south-southeast by the pilot-house compass (here witness points out on the chart the course the vessel would have taken according to that testimony). That would be your course.

Q. Now the line marked ab, would be the course on which you were sailing if you continued on that course from Point No Point to Appletree cove?

A. Yes, sir, that would be the course that we were steering.

Q. Will you indicate here about what point on this course this collision occurred and mark it?

A. As near as I could tell, at 11:37 it would be about somewhere in the neighborhood of a mile and three-quarters or two miles above Point No Point.

Q. Indicate it here.

A. (Showing.) Not more than a mile and three-quarters and maybe two miles.

Q. Pretty nearly opposite Pilot Point?

A. Pretty nearly opposite Pilot Point.

Q. I will mark a little circle at the point which you indicate. That, you say, would be about the place where the collision occurred?

A. That would be the place the collision occurred, taken from the boat's time that she had made up to Point No Point—not over a half a mile out.

Q. What kind of a shore is there along there?

A. From Point No Point to Pilot Point the shoal makes out quite a ways before you get to Pilot Point, and before you get to Pilot Point there is large boulders, and

(Testimony of Charles T. Bailey.)

they come out at extreme low water in the summertime.

Q. How far from the shore line?

A. I should say 100 yards or 200 yards. It runs dry between Pilot Point and Appletree Cove; it runs dry at low water.

Q. Is it shallow water some distance from there out?

A. It drops off gradually.

Q. Now, Captain, having a vessel like the "Queen Elizabeth" in tow and the "Tyee" proceeding on the course which you have described and seeing the "Lakme" approaching end on or nearly so; what would you say would be the proper course for the officer in charge of the "Tyee" to pursue, having in view the safety of his tow?

A. Well, in that case I should do as the officer of the "Tyee" did; pass to the starboard and give more room. Where he would have more room for his ship. A tug will swing much quicker than a ship would.

Q. Would there be any danger in getting close in shore with a light laden large ship like the "Queen Elizabeth"?

A. There would, yes, sir.

Q. How was the tide at that time?

A. The tide at that time was ebbing, ebbing on the shore.

Q. Would that tend to set a light laden vessel like the "Queen Elizabeth" in shore?

A. It would. In other words, in that case—in the case of the "Tyee" that night, the ship's wheel would have—should have been put hard-to-port and after being put hard-aport and after having been put hard-aport before

(Testimony of Charles T. Bailey.)

they could have recovered her with a starboard wheel, she would have got in on shore—there was not room enough for the ship to turn from the distance to the beach from where the "Lakme" struck him.

Q. That is if they took the other course?

A. Yes, sir; the ship could not have passed inside the "Lakme," and recovered himself before she would have been on the beach. She would have to have come off again on the starboard wheel after the wheel was put hard-to-port and before he would have time to have done that he would have been on the beach. There was lots of room on the outside—there was most room there.

Q. Is it usual for steamers to keep so close in shore in transit down the sound? A. No, sir.

Q. You say you regularly go on this same course?

A. We steer off finer course with the tow than any other steamer that is running light. We run half or three-quarters off in any kind of thick weather.

Q. And in case of fogs—

A. We run by the whistles.

Q. And the steamers run out well in the channel?

A. Yes, sir, the steamers are outside—all the steamers coming down the sound would be out in that course off there (showing). They pass about a mile and a half off Appletree Cove and half way between Point No Point and Bush Point or Double Bluff.

Q. Did you know anything about the "Lakme's" lights prior to this time?

(Testimony of Charles T. Bailey.)

A. The only thing I had known is that I had heard people on the sound here—

Mr. GRIGGS.—We object to that as irrelevant, immaterial and incompetent and move to strike out the answer as not responsive and as irrelevant, immaterial and incompetent.

A. Just what I heard; that is all.

Q. If the screen boards of the "Lakme's" sidelights were not parallel with the keel, but fastened to the rigging— A. Yes.

Q. (Continuing.) So that they would form two sides of an angle with each other, the apex of the angle being over the bow of the ship, what effect would that have on the lights?

A. You would be able to see both lights from one side; the port light would show on the starboard side and the starboard light would show on the port side.

Q. Would it be possible in that condition to always tell definitely what was the position?

A. It would not.

Q. How?

A. No, you could not tell within a point or two points, how she was heading to make sure, positively.

Q. If the "Lakme" was any distance, say from half a mile to a mile off from the head of the "Tyee," and was end on, or nearly end on, would there be any difficulty with proper seamanship on the part of both of the steam vessels, in clearing on the starboard helm?

(Testimony of Charles T. Bailey.)

A. None whatever. If the "Lakme" had proceeded on her course, the position of the two boats that night, she would have gone clear even then.

Q. Suppose that the "Lakme" had been two degrees on the port bow of the "Tyee," would there have been any difficulty? A. None.

Q. If she were not more than two degrees on either bow of the ship, would you call that nearly end on?

A. Yes, sir. Two degrees—in order for a man to determine whether a vessel is on one bow or the other, he cannot do it—the only way he could do it is to go right on forward and get the exact line from the center of his stem in order to determine two degrees—that is the one-sixth of a point.

Q. In other words, whether a vessel was two degrees on one bow or the other, might be determined very much by the position that the man stood upon the ship?

A. Yes, sir. If he stood on the starboard side he might think she was two degrees on that side, or if he stood on the port side he might think she was two degrees on the port side.

Q. Captain, how long have you known Mr. Olson, the mate that was on duty that night?

A. Well, I think I have known him off and on about six years.

Q. Has he been under you in any capacity?

A. He was quartermaster with me in one boat for two years steadily. He stood watch for two years on the deck of the "Wanderer" as quartermaster.

(Testimony of Charles T. Bailey.)

Q. How did you come to employ him at the time he was employed?

A. I employed him as being a steady man and a worker, a man that I could trust with the wheel and always to do his work. I have known him two years, and I don't think he was off of his boat more than—he took one vacation and he got a man to take his place and he was off for a short while.

Q. What was the immediate occasion of your employing him at that time?

A. I went into Port Townsend with a sick mate and I arrived in there one night and the tug "Wanderer" was right there at the time doing a little work on her boilers, and my mate went ashore, and the "Wanderer" was not going to be out for a couple of days, and I took the mate off the "Wanderer" to make this trip with me and he stayed there until Williams, my regular mate got well and came back to work again. He has been in the employ of the tugboat company for about four years at different times; he was mate in one boat for nine months.

Q. Did he have a pilot's license?

A. Yes, sir, he has a pilot's license.

Q. Did he at that time?

A. Yes, sir, and he had it for two years and more—it was issued in 1898, if I remember right.

Q. Was he competent to have charge of a tugboat on this occasion?

A. He was—he was a good pilot on the sound, and

(Testimony of Charles T. Bailey.)

understands the rules of the road, and if a man gives him two whistles he knows what to do.

Q. Under circumstances such as these, if the tug determined it was safer on account of her tow to keep further off shore and out in the channel, what would be the first steps that the officer in charge would take?

A. He would signal to the approaching vessel.

Mr. GRIGGS.—I object to this as indefinite.

Q. And if the mate on this occasion gave him two whistles— A. Yes.

Q. State whether or not that was a proper signal.

A. That was a proper signal at that place and at that time.

Mr. GRIGGS.—We make the same objection.

Q. (Mr. HUGHES.) Now, if the "Lakme" answered with two whistles, what would that signify?

A. That would signify that the mate of the "Lakme" put his wheel to starboard and swung to port.

Q. What would be the duty of the officer in charge of the deck?

A. To do the same, to put his wheel to starboard and swing to port.

Q. Would there be any room for uncertainty or doubt on the part of the officer in charge of the tug as to what the "Lakme" intended to do?

A. No, sir, no room at all and no chance for any doubt at the time that the whistles were blown.

Q. If, at the time the tug gave two whistles, the officer

(Testimony of Charles T. Bailey.)

in charge of the "Lakme" did not consider that there was room or space to pass, for the two vessels to pass each other's starboard, what should he have done?

A. He should have stopped his vessel, reversed her full speed astern and blown three short whistles to notify the pilot of the "Tyee" that he was going full speed astern.

Q. How near could the "Lakme" have been to the tug and have avoided the collision by adopting the course which you have just stated, by reversing full speed astern and blowing three whistles?

A. I should say about four lengths, probably; about six hundred feet, maybe less than that—four hundred feet. It all depends upon how quick she was to answer her wheel.

Q. How far behind you was the "Queen Elizabeth"?

A. About six hundred feet.

Q. How did she follow you?

A. She followed—of course a tug will swing quicker than a ship will, and a light ship will swing quicker than a loaded ship. The "Queen Elizabeth" was a fine steering ship, and she came around quicker than an ordinary iron vessel will come; she was clean and in ballast.

Q. If the "Lakme" had been properly maneouvered after the time she was abeam of you, could she have cleared the "Queen Elizabeth" by reversing her engines and going full speed astern?

A. Yes, sir; the "Queen Elizabeth" would have gone across the "Lakme's" bow and never touched her.

(Testimony of Charles T. Bailey.)

Cross-Examination.

Q. (Mr. GRIGGS.) Have you employed Mr. Oleson in any capacity since this collision? A. No, sir.

Q. Now, you know nothing personally from your own knowledge of the course of your boat; of the tugboat, or in regard to the approaching course of the "Lakme" until after you came on deck that night you did not know anything of your own knowledge as to the course of the vessel at all?

A. I know the course the vessel must be in; she could not steer any other course up there at that time.

Q. You do not know anything of your own knowledge except based upon your knowledge of what she ought to have done, or what she usually did, or as to what course the tug took that night until after you came on deck.

A. Well, I have the log-book to refer to, and I saw the time—

Q. That is not of your own knowledge, as to what is in that log-book.

A. It is put there by another man but it is put there for my inspection.

Q. You retired at what point?

A. Off Bush Point.

Q. And from that time until you heard the mate call you did not come on deck at all, did you?

A. No.

Q. Now, in drawing your course on this chart, how did you arrive at the point A, opposite Point No Point?

A. We arrived there by steering a certain course.

(Testimony of Charles T. Bailey.)

Q. I mean how did you fix that point A?

A. I fixed it by the "Tyee" log-book.

Q. You do not understand me; what measurements did you use from Point No Point to point A to fix point A on the chart— how did you scale it?

A. I used three-quarters of a mile; that is our customary distance in passing Point No Point.

Q. And you would pass a half a mile off Appletree Coee, that is your usual course?

A. That is our regular course.

Q. You started at the point A, three-quarters of a mile from Point No Point?

A. That is where the light is abeam.

Q. That is three-quarters of a mile into the sound?

A. Yes.

Q. And from that to point B is from what course?

A. South southeast by the pilot-house compass or southeast three-quarters south, magnetic.

Q. In the same way you arrived at the point which you have marked O, which you supposed the collision to have occurred at, by figuring the time it would take you.

A. The time from Point No Point until the time until the collision happened.

Q. Now—

A. (Interrupting.) As far as where the collision occurred, I know where it was.

Q. What do you know about when you were abeam of Point No Point—now, how do you know what time it was?

A. I know it just as well as—I know it this way. If

(Testimony of Charles T. Bailey.)

you start from this office and you are living four blocks from here, and you walk that distance ten times a day, you know it takes you so many minutes to make that distance. Now, it takes me just so long to go from Point No Point to Appletree Cove.

Q. You figure that you were opposite Point No Point at three thirty-seven? A. Yes, sir.

Q. You were not awake at that time?

A. No, sir.

Q. You did not see the clock?

A. There was a man in the pilot-house that saw the clock.

Q. You did not see the clock?

A. No, sir, I did not see the clock, I was asleep.

Q. All you know about it is what is shown on the log-book?

A. What is contained in the log-book and the distance that the boat made from the time she left Port Townsend until she arrived at Point No Point or until I left the deck —I know the distance she makes and the time it takes her to make that distance.

Q. How far below Point No Point was it before you got on the deck, do you know that?

A. I came on deck about two minutes before the collision, I should judge.

Q. Did you look at the clock at the time?

A. I looked at the clock.

Q. When did you look at the clock?

(Testimony of Charles T. Bailey.)

A. I looked at the clock after we swung around to go down to speak to the "Lakme" after the collision. That was six minutes after four. We had been in the collision, and I had stopped and spoke about the collision and swung down and came to the "Lakme," and it was six minutes to four when I was there.

Q. Did you notice the tide at the time?

A. No, sir.

Q. Did you notice where you were at the time you were speaking to the "Lakme" with reference to Point No Point or Pilot Point? A. Yes.

Q. Could you tell whether you were above or below Pilot Point?

A. I was below Pilot Point and about two-thirds of the way between Pilot Point and Point No Point; maybe a mile or a mile and a half off shore; that was when I was speaking to the "Lakme."

Q. On what portion of the tug were you when the "Lakme" passed you before she struck the tow?

A. I stood in the pilot-house until she got abaft my beam; as she got abaft our beam I took a step aft to the aft end of the house.

Q. You say there was a distance of about two hundred feet?

A. I should judge two hundred feet from between our stern and the "Lakme" when she passed us.

Q. How long is your tug?

A. One hundred and fifty feet.

(Testimony of Charles T. Bailey.)

Q. She was farther away than the full length of your tug?

A. It is pretty hard to determine the distance at that time of the night; I should say that she was farther away than two hundred feet. It is hard to tell in the daytime in the water with your eye and night-times it is much harder.

Q. Do you have any recollection of falling asleep after the whistles blew that night?

A. No, sir, I was asleep when the whistles blew.

Q. Did you—

A. Well, the way it is with me I can sleep—I can lay down and sleep and hear every whistle that is blown and not be entirely awake—you get accustomed to that.

Q. You heard both whistles?

A. I heard the "Lakme's" whistles blown and I heard our whistles almost at the same time.

Q. Have you any recollection of whether you dropped to sleep afterwards?

A. No, I don't think I did; I may have dozed off but I didn't drop sound asleep because when the mate sung out to the "Lakme," that called my attention and I went from there into the pilot-house then.

Q. Now, how much of a tow-line did you have?

A. We had about six hundred feet, as near as I can tell, about six hundred fathoms; with wire and manilla altogether it would be six hundred and twenty feet.

Q. Did you hear your assistant engineer converse or say anything to Engineer Harkins?

(Testimony of Charles T. Bailey.)

A. No, sir, that was down below out of the way—forty feet from where I was in the pilot-house. The only conversation I heard was Harkins; when I went off the chief was standing on the deck, and he said they had better get a move or he would run into them, and that was all the conversation I heard.

Q. When you heard the mate talking and when you got up did you go directly to the pilot-house?

A. I went into the pilot-house.

Q. How far away from the pilot-house were you at the time that you heard him?

A. About two inches; just the thickness of the partition between the pilot-house and my room. Just like opening that door and walking in.

Q. Did you look up at the "Lakme" just as soon as you came out of your room?

A. Yes, sir, I went right to the window.

Q. How far away was she then?

A. I should judge the "Lakme" was between three hundred and fifty and five hundred feet; I could not say exactly, but I should judge it was something like that, probably more than that; I think she was all of five hundred feet.

Q. You answered the question in regard to whether the ship would be considered end on or nearly so when you were standing on your ship, and saw the red light of another two degrees either way?

A. Yes, sir; I said, the red and the green light.

Q. Well, it would be either one? A. Yes, sir.

No. 830

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MOK CHUNG,

Appellant,

vs.

THE UNITED STATES,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the Northern District of California.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Marshall B. Woodworth, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco. in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the District Court of the United States, for the Northern District of California, wherein Mok Chung is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, this 10th day of April, A. D. 1902.

JOHN J. DE HAVEN,
United States District Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this 10th day of April, A. D. 1902. San Francisco, Cala.

MARSHALL B. WOODWORTH,
United States Attorney, Northern District of California.

[Endorsed]: No. 12,528. United States Circuit Court of Appeals, for the Ninth Circuit. Mok Chung (on Habeas Corpus), Appellant, vs. The United States, Appellee. Citation. Filed April 10th, 1902. Geo. E. Morse, Clerk United States District Court.

In the District Court of the United States, Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } [Petitioner's Picture]

Petition for Writ of Habeas Corpus and Order Allowing Same.

To the Honorable J. J. DE HAVEN, the Judge of the Above-Entitled Court:

The petition of Mok Jim respectfully shows:

That Mok Chung a passenger on the S. S. "San Jose," is unlawfully imprisoned, detained, confined and restrained of his liberty by the agent of the Pacific Mail S. S. Co., in the city and county of San Francisco, State of California.

That the said imprisonment, detention, confinement, and restrain are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by the said agent that the said passenger is a subject of the Emperor of China, and must not and cannot be allowed to land under the provisions of the act of Congress of May 6, 1882, entitled "An act to execute certain Treaty Stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto.

That the said passenger does not come within the restrictions of said act or acts, but on the contrary your petitioner alleges that the said passenger was born in the city and county of San Francisco, State of California.

That the said passenger has applied to the Collector of the Port at San Francisco, for permission to land. That the said application for landing has been refused.

That your petitioner makes this petition in behalf of the said passenger.

Wherefore your petitioner prays that a writ of habeas corpus be granted, directed to said agent, commanding him to have the body of the said ———— before your Honor at a time and place to be specified therein, to do and receive what shall then and there be considered by your Honor concerning him together with the time and cause of his detention and said writ, and that he may be restored to his liberty.

Dated San Francisco, December 30th, 1901.

(Signature in Chinese.) MOK JIM,
Petitioner.

GEO. A. McGOWAN,
Attorney for Petitioner, No. 508 Montgomery St., San Francisco.

State of California,
City and County of San Francisco,
Northern District of California,
United States of America. } ss.

Mok Jim, being first duly sworn upon oath, deposes and says: That he is the petitioner above named, and that he has heard read the foregoing petition and knows

the contents thereof; and that the same is true of his own knowledge.

(Signature in Chinese.) MOK JIM.

Subscribed and sworn to before me this 30th day of December, A. D. 1901.

JOHN FOUGA,

Deputy Clerk United States District Court, Northern District of California.

Let the writ of habeas corpus issue pursuant to the prayer of the petition, returnable December 31st, 1901. And ordered that the case be referred to the Honorable E. H. HEACOCK, to take proofs and report findings and judgment; and ordered that the detained when produced be remanded to the custody of the United States Marshal of this District, till further order of Court.

JOHN J. DE HAVEN,

Judge.

Dated December 30th, 1901.

[Endorsed]: Filed December 30, 1901. Geo. E. Morse, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Writ of Habeas Corpus.

The President of the United States of America, to the Master of the Steamship "San Jose," or General

Agent of Pacific Mail Steamship Company, or whoever may have the custody or control of said Mok Chung, Greeting:

You are hereby commanded, that you have the body of the above-named person, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California, at the courtroom of said court in the city and county of San Francisco, California, on the 31st day of December, 1901, at —— o'clock A. M., to do and receive what shall then and there be considered in the premises. And have you then and there this writ.

Witness, the Honorable JOHN J. DE HAVEN, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 30th day of December, A. D. 1901.

[Seal] GEO. E. MORSE,
Clerk of said District Court.

In obedience to the within writ, I hereby produce the body of the within named defendant as within directed, and return that I hold the said person in my custody, by direction of the Customs authorities of the Port of San Francisco, California, under the provisions of the Chinese Restriction Act.

San Francisco, December 31st, 1901.

A. G. D. KERRELL,
Passn. Agt. Steamship Pacific Mail S. S. Co.

[Endorsed]: Issued December 30th, 1901. Returnable December 31st, 1901. Filed on return this December 31st, 1901. George E. Morse, Clerk of said United States District Court. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Marshal's Return of Service of Writ of Habeas Corpus.

The President of the United States of America, to the Master of the Steamship "San Jose," or General Agent of Pacific Mail Steamship Company, or whoever may have the custody or control of said Mok Chung, Greeting:

You are hereby commanded, that you have the body of the above-named person, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California, at the courtroom of said court in the city and county of San Francisco, California, on the 31st day of December, 1901, at —— o'clock A. M., to do and receive what shall then and there be considered in the premises. And have you then and there this writ.

Witness, the Honorable JOHN J. DE HAVEN, Judge of the said District Court, and the seal thereof, at San

Francisco, in said District, on the 30th day of December, A. D. 1901.

[Seal] GEORGE E. MORSE,
Clerk of said District Court.
By ————————,
Deputy Clerk.

I, George E. Morse, clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be a copy of the writ of habeas corpus, issued in the within entitled matter.

Attest my hand, and seal of said District Court this 30th of December, A. D. 1901.

[Seal] GEO. E. MORSE,
Clerk.

I hereby certify, that on the 30th day of December, 190—, I received the writ of which the within is a copy, and that on the 31st day of December, 1901, at San Francisco, in this District. I personally served the said writ, by delivering to and leaving the same with General Agent for Pacific Mail Steamship Co.

Dated, San Francisco, Cal., December 31, 1901.

JOHN H. SHINE,
United States Marshal.
By R. De Lance,
Office Deputy Marshal.

[Endorsed]: Issued December 30th, 1901. Returnable December 31st, 1901. Filed on return, this day of December 31st, 1901. Geo. E. Morse, Clerk of said United States District Court. By John Fouga, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Intervention by United States.

Now comes the United States attorney for the Northern District of California, and by leave of Court first had and obtained, intervenes on behalf of the United States in the above-entitled matter and for ground of intervention alleges:

1. That the said Chinese person above-named is a laborer by occupation and has not previous to the filing of the application for a writ of habeas corpus been in the United States.

2. That the said Chinese person has failed to produce the certificate required by the Exclusion and Registration Acts, and is not a member of the privileged class mentioned in said acts, who are allowed to come, to be and to remain in the United States.

3. That the said person is lawfully detained by the master of the steamship "San Jose" mentioned in said petition.

Wherefore, the said United States attorney prays that a judgment of remand be made by this Honorable Court, directing that the said Chinese person above-named, be returned to the custody from which he was taken, and

the country from whence he came, and for such other and further order as may be proper.

MARSHALL B. WOODWORTH,
United States Attorney.

[Endorsed]: Filed December 31st, 1901. Geo. E. Morse, Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Warrant of Commitment.

The President of the United States of America, to the Marshal of the United States for the Northern District of California, and to his Deputies, or any or Either of Them, Greeting:

The above-named party having been produced in obedience to the writ herein, and the Judge of said court having ordered that said party be committed to the custody of the United States marshal for this district until the further order of the Court:

Now, therefore, you are hereby commanded to receive into your custody and safely keep the said above-named party until the further order of the Court herein.

Witness, the Honorable JOHN J. DE HAVEN, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the December 31, 1901.

[Seal] GEORGE E. MORSE,
Clerk of the said District Court.
By J. S. Manley,
Deputy Clerk.

United States Marshal's Office.
Northern District of California.

The within warrant of commitment was received by me on the 31st day of December, A. D. 1901, and is returned executed this 31st day of December, A. D. 1901.

San Francisco, California, December 31st, 1901.

JOHN H. SHINE,
United States Marshal.

By R. De Lance,
Office Deputy Marshal.

[Endorsed]: Issued December 31st, 1901. Returned and filed this December 31st, 1901. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

Honorable E. H. HEACOCK, Special Referee.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Testimony.

Thursday, January 16, 1902.

Appearances:

GEORGE A. McGOWAN, Esq., for the Petitioner.

BENJAMIN L. McKINLEY, Esq., for the United States.

(D. D. Jones was sworn to act as interpreter in the case.)

MOK YEE FOON, called for the petitioner, sworn.

(Mr. McGOWAN.)

Q. Where do you reside? A. Palo Alto.

Q. What is your business there?

A. I am a nurseyman.

Q. For yourself, or are you working for somebody else? A. There are numbers of us in shares.

Q. What is the name of your nursery?

A. Quong Lee.

Q. Do you know the petitioner in this case, Mok Chung? A. Yes, sir.

Q. Where was he born? A. On Dupont street.

Q. In San Francisco? A. Yes, sir.

Q. What number on Dupont street?

A. 900, Dupont street.

Q. When was he born?

A. The 7th year of Quong Sue.

Q. What month and day?

A. The 10th month, 15th day (5th day of December, 1881).

Q. What is his father's name?

A. Mok Chuey Chu.

Q. What was his mother's name?

A. Leong Shee.

Q. Where is their home in China?

A. Chuck Sue Hong.

Q. What district? A. Heong Sarn District.

Q. Where is your home in China?

A. In the same place.

Q. Are you any relation of this boy?

A. Clansman.

(Testimony of Mok Yee Foon.)

Q. Are you any relation to him?

A. Only clansman.

Q. How do you know that he was born here?

A. I know he was born on Dupont street; I was here.

Q. How old was he the first time you saw him?

A. I saw him at the end of the month.

Q. Have you been to China in recent years?

A. In the 24th year of Quong Sue, I was home.

Q. When did you return to California?

A. In the 25th year.

Q. Did you see this boy, Mok Chung, in China?

A. Yes, sir.

Q. Did you see him at his and your village?

A. Yes, sir.

Q. How do you know the boy you saw in China was the boy that was born here?

A. My clansman told me about it.

Q. Who told you about it? A. My clansman.

Q. What was his name? A. Chue Kee was one.

The REFEREE.—Q. Is he any relation to the boy?

A. No, sir; just a clansman.

Mr. McGOWAN.—Q. Who else told you?

A. Nobody.

The REFEREE.—Q. Did any relative of the boy tell you he was born here? A. Only my clansman.

Mr. McGOWAN.—Q. When you were in China, did you see this boy's parents?

A. I saw his mother; I did not see his father.

Q. Why did you not see his father?

A. He had gone to the Spanish country.

(Testimony of Mok Yee Foon.)

Q. Was Mok Chung living with his mother there all the time? A. Yes, sir.

Q. How did you know it was his mother?

A. My clansman told me.

Q. Did you remember her from seeing her in California before? A. I recognized her.

Q. Do you know she had a boy born here?

A. Yes, sir.

Q. Was there any other boy living at that house at that time? A. Yes, sir.

Q. Any other boy?

A. I did not see him at home; I only saw him in the ancestral hall.

The REFEREE.—Q. You did not see him at his house? A. Yes, sir.

Q. Who of his relatives did you see while in China, if any?

A. I saw his aunt and the children of the aunt and the mother; just so many.

Q. Where did you see his mother; at what house?

A. I was in the house and saw her.

Q. Which house? A. In the mother's house.

Q. Who else was there when you saw the mother?

A. The aunt and the children were there.

Q. Was the boy there?

A. No, sir; the boy was not there; the children of the other woman were there.

Q. Where was the boy?

A. He was in the ancestral hall.

Q. At school? What was he doing there?

(Testimony of Mok Yee Foon.)

A. He was at school.

Q. How many times did you see the boy while you were in China? A. Many times.

Q. How many?

A. Tens of times; I don't remember.

Q. Where did you see him?

A. In the ancestral hall, but once in a while I would see him outside.

Q. You saw him mostly in the hall? A. Yes, sir.

Q. Going to school?

A. I would be passing by often, and I would see him through the door.

Q. How often did you see him in the hall; you yourself going in the hall? A. Ten or more times.

Q. In what building, if any, did you see him besides the ancestral hall? A. In town.

Q. In what town? A. The Do Moon market.

Q. Did you go with him to market? A. Yes, sir.

Q. How frequently did you go with him to market?

A. So many times that I cannot remember how many.

Q. Where would you meet him when you would go with him to market? A. From the ancestral hall

Q. Where would you meet him from the hall; would he come outside or would you go inside?

A. I would call him from the door outside.

Q. And he would come out? A. Yes, sir.

Q. Anybody else ever go with you to the market?

A. Sometimes we might meet two together, and sometimes there may be three or four of us.

Q. Who else? A. Yick Wing was one.

Q. Was he a student at the school, too?

(Testimony of Mok Yee Foon.)

A. No, sir; he was in China.

Q. Would you and Yick Wing go together to the hall, and then call him?

A. About more or less we would go there together.

Q. You and Yick Wing woul go there and get him?

A. More or less.

Q. How frequently did Yick Wing go with you to the hall? A. Ten times or more.

Q. In what other building, if any, did you see the boy besides in the hall?

A. Only in the schoolhouse.

Q. How many houses are there in that village?

A. Twelve new houses, and over one hundred old ones.

Q. Are you married? A. I am married, yes.

Q. When did you get married?

A. In the 25th year.

Q. You were married on that trip to China?

A. Yes, sir.

Q. Was the boy at your wedding? A. Yes, sir.

Q. You saw him in the house then, didn't you?

A. Yes, sir, he came from school to my house at that time.

Q. Then you did see him in some other house besides the hall? A. He came to see the bride.

Q. Was he in your house? A. Yes, sir, twice.

Q. What other time was he at your house besides at the feast at the wedding?

A. Only twice; that he came to see the bride.

Q. Was he ever at your house more than the two times? A. Only two times.

(Testimony of Mok Yee Foon.)

Q. And both times to see the bride?

A. Yes, sir.

Q. Was it on the same day that he came down to see the bride?

A. No, sir, it was on different days.

Q. How long after your marriage did he come the second time? A. The second day.

Q. Who were there on the second day?

A. A great many clansmen came there, just the same. There were a good many clansmen came the second day.

Q. How many tables were set in your house the first day?

A. The meal was eaten at the ancestral hall.

Q. The feast was at the hall and not at your house?

A. There were a few that ate in the house. There was not enough room in the house so they had to use the ancestral hall.

Q. You never saw the boy in any other building while you were in China except in the hall and on these two occasions when he came to see the bride at your house?

A. And at the market.

Q. At the market also? A. Yes, sir.

MOK CHUNG, the petitioner, sworn.

Mr. McGOWAN.—Q. Where were you born?

A. In California.

Q. What city? A. In San Francisco.

Q. What street and number?

A. 900, Dupont street.

Q. When were you born?

A. The 7th year of Quong Sue.

(Testimony of Mok Chung.)

Q. What month and day? A. I don't know.

Q. What was your father's name?

A. Mok Chuey Chu.

Q. What is your mother's name? A. Leong Shee.

Q. Where is your home in China?

A. Chuck Sue Hong.

Q. What district? A. Heong Sarn.

Q. Who have you seen in China from this country?

A. Yee Foon and Mok Yee You.

Q. Who else? A. I don't know.

Q. You mean Mok in front of their name?

A. Yes, sir.

Q. When did you see Mok Yee Foon?

A. When he went home in the 24th year.

Q. When did he return? A. In the 25th year.

Q. When did Mok Yee You go to China?

A. I was small at that time; I don't remember what year it was.

Q. About how many years ago was it?

A. Just at the age when I went to school.

Q. About how old were you when you first saw Mok Yee You? A. About thirteen or fourteen.

Q. Where did Mok Yee Foon live?

A. At my village.

Q. Where did Mok Yee You live?

A. In the same village.

Q. Did you see any one else in China from this country? A. No, sir; not that I know of.

Q. Where is your father now?

A. In the Spanish country.

Q. When did he go there? A. In the 20th year.

(Testimony of Mok Chung.)

Q. Was he in China before that?

A. He was home; he went from California back to China.

Q. Where is your mother now?

A. He went home at the same time with me.

Q. Where is your mother now, I asked you?

A. In China; in that village.

Q. Have you any brothers? A. No, sir.

Q. Any sisters? A. No, sir.

Q. Have you any uncles or aunts?

A. Yes, sir; I have an uncle in California.

Q. What is his name? A. Mok Yee You.

Q. Has he ever been back to China?

A. When I was a few years old.

Q. And not been back since? A. No, sir.

Q. Have you any other uncles in California besides that one?

A. No, sir. In the Spanish country there is a maternal uncle.

(The REFEREE.) Q. How long have you worn that character of garb that you now have on?

A. My uncle brought it down to the wharf.

Q. Why did he bring it to the wharf to you? What reason did he give for sending this sort of garb to you?

A. Because he saw that I was very cold, and that I had not clothes enough.

Q. Did you not have ordinary Chinese clothing?

A. I did not have enough.

Q. Did you have any companion on board the boat who wore similar clothes? Did you know Mok Yin aboard the boat?

(Testimony of Mok Chung.)

A. Yes, sir, Mok Yin came on the same boat with me.

Q. What sort of clothing did he wear—American clothes? A. Yes, sir.

Q. Where did he get his American clothes from?

A. That I don't know.

Q. Did he wear American or Chinese clothes before he arrived here? A. I don't remember.

Q. You came with him on the boat?

A. On the boat he wore Chinese clothing.

Q. Until he arrived here?

A. After he arrived, he commenced to wear them.

Q. Is he any relation of yours? A. A clansman.

Q. Did you know him in China? A. Yes, sir.

Q. Did he live in your village? A. Yes, sir.

Q. I am going to ask you about Mok Yee Foon now. How frequently did you see him in China?

A. All along daily.

Q. Where did you see him?

A. In the ancestral hall and in the street.

Q. And anywhere else? A. In the market.

Q. What market? A. Do Moon.

Q. How frequently did you see him in the ancestral hall?

A. Several times; I don't remember how many. In the evening time after school hours we would sit in the ancestral hall.

Q. What do you mean by the "evening time"?

A. After meal time and when it would be dark.

Q. How do you mean, you and he would sit together? Was there school going on then?

A. I am speaking now of the holidays.

(Testimony of Mok Chung.)

Q. During the period when it was not holidays, where did you see him?

A. I saw him during that year in the ancestral hall.

Q. Was school in session?

A. He did not enter into the part where the school was being kept.

Q. What part of the building did you see him in?

A. There were other rooms there.

Q. And would you go in there and sit down with him, or what would happen? A. In the evenings?

Q. Would you sit there and talk with him?

A. Yes, sir; in the evenings. I am speaking now of during the 25th year.

Q. Would there be any one else talking to you and he?

A. Oh, yes; people would come in there. It was a kind of a reception room for the clansmen.

Q. In the daytime, on other days than holidays—I am referring now to the time when the school was going on from day to day, did you see him in the hall?

A. I have seen him pass by the doorway when I have been in the school.

Q. Did he ever come into the schoolroom and sit down while the school was going on? A. No, sir.

Q. At no time? A. No, sir.

Q. When he would pass by the door when the school was in session that way, was there any conversation between you and him or any signs between you and him?

A. No, sir.

Q. You would only see him on such occasion as he

(Testimony of Mok Chung.)

would pass, and when he would pass out of sight you would not see any more of him? A. No, sir.

Q. Was that always the case when you would see him pass by the school-house? A. Yes, sir.

Q. Did you ever see him at your house?

A. No, sir.

Q. How frequently would you see him passing by the door of the schoolhouse?

A. I could not remember how many times.

Q. Often? A. Yes, sir.

Q. Which way would he be going? Would he be going towards the market, or in the opposite direction?

A. Both ways.

Q. Anybody with him usually?

A. Sometimes there would be others with him.

Q. How frequently did you go to the market with him? A. Many times.

Q. Did you go to the market with him at any other time than holidays?

A. When there was no school I used to go with him to market, and during the period that there was school I would go two or three times with him.

Q. When there was school, you went with him two or three times? A. Yes.

Q. Only?

A. At this time it would be during the period of time the school was in session, but not during the session of the school; that is, it would be noon-time, and my mother would want me to go and buy something, or so on.

(Testimony of Mok Chung.)

Q. Do I understand you that during the school season, you only went to market with him, and during the noon recess once when the school was not in session?

A. Except when there was let-out of school; when there was no let-out of school, I did not go.

Q. Where would you start from to go to the market with him at these times that school was let out?

A. He would come to the door of the ancestral hall and say, "I am going to the market; do you want to come along?"

Q. What would you be doing when there was no school?

A. After going home to meals, we would be around there.

Q. Do you mean that you would be outside of the hall or where, when he would come around?

A. On the outside.

Q. Did he ever call you out of the hall at any time to go to market with him?

A. No, sir, he never called me out.

Q. At no time? A. No, sir.

Q. I understand you that during the portion of the year when the school was held, he never called you out of the hall?

A. No, sir, never called me out during the 25th year.

MOK YEE FOON, recalled.

The REFEREE.—Q. How old are you?

A. Thirty.

Q. What day and month were you born?

A. The 4th year of Tung Gee, 9th month, 21st day.

(Testimony of Mok Yee Foon.)

Q. Where? A. In China.

Q. When you were here before, did I understand you correctly to say that when you would be passing along the hall—I will change that question: I want to ask you about seeing the boy on other times than during the holidays, or rather seeing him during the season of the year during the days of the week; when the school was going on and he attended school. I call your attention to that particular time. A. Very, well.

Q. During such period did you see the boy, and if so, where? A. Yes, sir, I saw him.

Q. Where? A. From the doorway.

Q. Whereabouts would he be?

A. He was studying.

Q. You saw him then in the schoolroom, studying, from the door? A. Yes, sir.

Q. How frequently? A. Many times.

Q. By "many times," do you mean frequently?

A. Yes, sir. I could not remember so many times.

Q. When you called him out as you would be passing by to go to the market with him, what was he doing at the time that you called him?

A. When I would go there to the door I would look in and I would see the boy, and I would call him, and if he had time he would come out, but if he did not have time he did not come, and this was at the time when he would be there studying.

Q. How frequently was that?

A. Several tens of times.

Q. From the schoolhouse, as I understand?

(Testimony of Mok Yee Foon.)

A. Yes, sir.

Q. While the school was in session?

A. Yes, sir.

MOK JIM, called for the petitioner, sworn.

Mr. McGOWAN.—Q. What is your business?

A. Gardener.

Q. When did you first come to California?

A. In the first year of Quong Sue.

Q. What did you do after that? A. Menlo Park.

Q. Who did you work for at Menlo Park?

A. Governor Stanford.

Q. How long did you work for Governor Stanford?

A. Over twenty-one years.

Q. You worked for him until he died?

A. Yes, sir.

Q. What did you do after that?

A. Mr. Stanford gave me permission to work for Mr. Will Crocker at Burlingame. Then I went back to Menlo. Mr. Tim Hopkins gave me the boarding-house there.

Q. Do you know the petitioner in this case?

A. Yes, sir.

Q. Where was he born?

A. He was born in San Francisco.

Q. What street?

A. Washington and Dupont street, 900.

Q. What was his father's name?

A. Mok Chuey Chu.

Q. Do you remember what his mother's name was?

A. Leong Shee.

(Testimony of Mok Jim.)

Q. How do you know that the boy was born here?

A. Mok Chuey Chu is my brother.

Q. How old was the boy the first time that you saw him?

A. I worked for Mr. Stanford at that time.

Q. Have you been to China?

A. Yes, sir; Quong Sue, 10th year, I went to China.

Q. When did you return? A. In the 12th year.

Q. Did you see this boy there?

A. Yes, sir; I saw the boy there. He was young then. Since I came back I don't know him.

Q. Have you seen this boy here? A. No, sir.

Q. I mean the boy that was in here and went out just now. A. Yes, sir; I saw him go out.

Q. Is this the same boy that you saw in China?

A. Yes, sir.

Q. How do you know? A. Yee Foon told me.

The REFEREE.—Q. That is the only way you know?

A. Yes, sir.

Mr. McGOWAN.—Q. Did you know he was coming here before he came?

A. I got letters stating that the boy was going to Mazatlan.

Mr. McGOWAN.—I should like to be sworn.

GEORGE A. McGOWAN, called for the petitioner, sworn.

The REFEREE.—Q. Where did Mok Chung come from?

(Testimony of George A. McGowan.)

A. He arrived on the steamer "San Jose," from Mazatlan.

The REFEREE.—I will reserve my decision in this matter.

2 o'clock P. M.

The REFEREE.—I recommend a remand of this case.

[Endorsed]: Filed April 9th, 1902. Geo. E. Morse, Clerk.

In the District Court of the United States, Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Report of Referee Recommending Remand and Order Confirming Same.

E. H. HEACOCK, Special Referee and Examiner.

Pursuant to the order of the above-named court duly made and entered herein, referring the above-entitled matter to the undersigned, as special referee and examiner, to hear the testimony, ascertain, determine, and report to the Court, the facts, and his conclusions of law thereon, and to recommend such judgment as in his opinion ought to be entered therein, the said matter having been regularly brought on for hearing, and the same having been duly heard and submitted, and due consideration having been thereon had, I the said special referee and examiner, do find as follows:

That the above-named petitioner is a subject of the Empire of China.

That said petitioner has not, by sufficient, satisfactorily established his right to enter and remain in the United States, in accordance with the treaties and laws of the United States.

I do therefore report that, in my opinion, judgment should be entered herein:

That said petitioner was not at the date of the petition herein illegally restrained of his liberty, as therein alleged.

That said petitioner came to the United States from Mazatlan, Mexico, by the steamship "San Jose" on the 29th day of December, A. D. 1901.

And I do further report that, in my opinion, the said petitioner should be returned by the United States marshal for the Northern District of California, to the custody whence he was taken, to wit, on board the said steamship to the custody of the master thereof, for the purpose of deporting him out of the United States, and transporting him to the port whence he came; and that the said marshal should take the said petitioner into custody, and him safely keep till said order shall be fully executed.

No exceptions were taken to the above report by the petitioner or by the United States.

E. H. HEACOCK,
Special Referee and Examiner.

The above report of the special referee and examiner is confirmed, and judgment is ordered to be entered in accordance therewith.

January 20, 1902.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed January 16, 1902. Geo. E. Morse, Clerk United States District Court, Northern District of California. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Order of Remand.

This matter having been regularly brought on for hearing upon the report of the special referee and examiner, it is by the Court now here ordered and adjudged:

That said report be, and the same is hereby confirmed, and it is adjudged and found that Mok Chung, the person in whose behalf the writ of habeas corpus herein was issued came from Mazatlan, Mexico, by the steamship "San Jose," and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

It is therefore ordered that the said above-named person be remanded by the United States marshal for the Northern District of California, to the custody whence he was taken, to wit: On board the said steamship to the custody of the master thereof, whoever he may be at the time of the order of remand, or to place the said above-named person in the hands and charge of any party on board said steamship for the time being representing the master, or then in charge of said steamship in the absence of the master, or for the time exercising

control or authority thereon; this order to be executed as to said steamship, whether still in port not having departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason the said above-named person cannot be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, for the purpose of deporting him out of the United States and transporting him to the port of Hong Kong. And for the purpose of carrying this order into effect, it is further ordered that the said marshal take the said named person into custody and him safely keep till said order shall be fully executed.

Entered this 20th day of January, 1902.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed January 20, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Notice of Appeal.

To the Clerk of the said Court and to the Honorable MARSHALL B. WOODWORTH, Esq., United States Attorney for the Northern District of California:

You and each of you will please take notice that the above-named Mok Chung, appellant, hereby appeals to

the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and order of remand made and entered herein on the 21st day of January, A. D. 1902.

San Francisco, California, January 25th, A. D. 1902.

GEO. A. McGOWAN,

Attorney for Mok Chung, Petitioner and Appellant.

Service of the within notice and receipt of a copy thereof is hereby admitted this 25th day of January, A. D. 1902, at San Francisco.

MARSHALL B. WOODWORTH,

United States Attorney for Northern District of California.

[Endorsed]: Filed January 25, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Petition for Appeal.

Comes now Mok Chung, the petitioner and appellant herein, by his attorney, Geo. A. McGowan, Esq., and says:

That on the 20th day of January, A. D. 1902, the above-entitled Court made and entered judgment and order of remand herein, in which judgment and the proceedings had prior thereunto in the above-entitled cause, certain

errors were committed to the prejudice of this appellant, all of which will appear more in detail from the assignment of errors which is filed herewith.

Wherefore, this applicant prays that an appeal may be granted in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the above-entitled action, duly authenticated, may be sent and transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

[Style of Court—Number and Title of Case]

Assignment of Errors.

Comes now Mok Chung, petitioner and appellant herein, by his attorney, Geo. A. McGowan, Esq., in connection with his petition for an appeal herein and assigns the following errors which he avers occurred upon the trial of the above-entitled cause, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

1.

That the judgment made and entered in said matter is contrary to law.

2.

That the judgment made and entered in said matter is contrary to the evidence.

3.

That the judgment made and entered in said matter is not supported by the evidence.

Wherefore, the said Mok Chung prays that judgment and order of the said District Court, in and for the Northern District of California, made and entered herein in the office of the clerk of the said court on the 20th day of January, A. D. 1902, remanding said Mok Chung, be reversed, and that this cause may be remitted to the said District Court, with instructions to discharge the said Mok Chung from custody.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

[Style of Court—Number and Title of Case.]

Order Allowing Petition for Appeal.

On this 8th day of April, A. D. 1902, came Mok Chung, the petitioner and appellant herein, by his attorney, Geo. A. McGowan, Esq., and filed herein and presented to this Court his petition, praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

On consideration whereof, the Court hereby allows the appeal prayed for, and orders execution and remand

stayed pending the hearing of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court, San Francisco, California, April 8th, A. D. 1902.

JOHN J. DE HAVEN,
District Judge.

Due service of the within papers is hereby admitted this 8th day of April, A. D. 1902, San Francisco, Cal.

BENJ. L. McKINLEY,
Assistant United States Attorney.

[Endorsed]: Filed April 8th, 1902. Geo. E. Morse, Clerk.

In the District Court, in and for the Northern District of California.

In the Matter of MOK CHUNG on Habeas Corpus. } No. 12,528.

Order Fixing Cost Bond.

It is hereby ordered that the cost bond on appeal in the above-entitled matter be, and the same is hereby fixed in the sum of one hundred dollars upon the giving of which by the appellant herein, the clerk will comply with the order allowing the appeal herein made on the 9th day of April, A. D. 1902.

Dated April 10th, 1902.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed April 10, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

Bond on Appeal.

Know all men by these presents, that we, Mok Chung, as principal, and Geo. Byles and Wm. M. Josephi, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one hundred (100) dollars, to be paid to the said United States of America, its certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of April, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a District Court of the United States, for the Northern District of California, in a matter depending in said court, in which said Mok Chung was the petitioner on habeas corpus, a judgment was rendered against the said Mok Chung, and the said Mok Chung having obtained from said Court an appeal to reverse the judgment in the aforesaid matter and a citation directed to Marshall B. Woodworth, United States attorney for the Northern District of California, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 10th day of May next.

Now, the condition of the above obligation is such, that if the said Mok Chung shall prosecute said appeal to effect, and answer all damages and costs, if he fails

to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signature in Chinese)

MOK CHUNG. [Seal]
GEO. BYLES. [Seal]
WM. M. JOSEPHI. [Seal]

Witness to signature of Mok Chung:

E. H. HEACOCK.

Acknowledged before me the day and the year first above written.

E. H. HEACOCK,
United States Commissioner, Northern District of California.

United States of America,
Northern District of California. } ss.

Geo. Byles and Wm. M. Josephi, being duly sworn, each for himself, deposes and says: That he is a house holder in said district, and is worth the sum of one hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GEO BYLES.
WM. M. JOSEPHI.

Subscribed and sworn to before me this 22d day of April, A. D. 1902.

E. H. HEACOCK,
United States Commissioner, Northern District of California.

Form of bond and sufficiency of securities approved.

JOHN J. DE HAVEN,
Judge.

BENJ. L. McKINLEY,
Assistant United States Attorney.

[Endorsed]: Filed April 22, 1902. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk.

Clerk's Certificate to Transcript.

I, George E. Morse, clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed thirty-nine pages, numbered from 1 to 39, inclusive, contain a full, true and correct transcript of the record in said District Court in the Matter of Mok Chung on Habeas Corpus, No. 12,528.

I further certify that the cost of said record, amounting to $21.30, has been paid by appellant.

Witness, my hand and the seal of said Court at San Francisco, this 29th day of April, A. D. 1902.

[Seal] GEO. E. MORSE,
Clerk.

[Endorsed]: No. 830. In the United States Circuit Court of Appeals for the Ninth Circuit. Mok Chung, Appellant, vs. the United States, Appellee. Transcript of Record. Upon appeal from the United States District Court for the Northern District of California.

Filed April 30, 1902.

F. D. MONCKTON,
Clerk.